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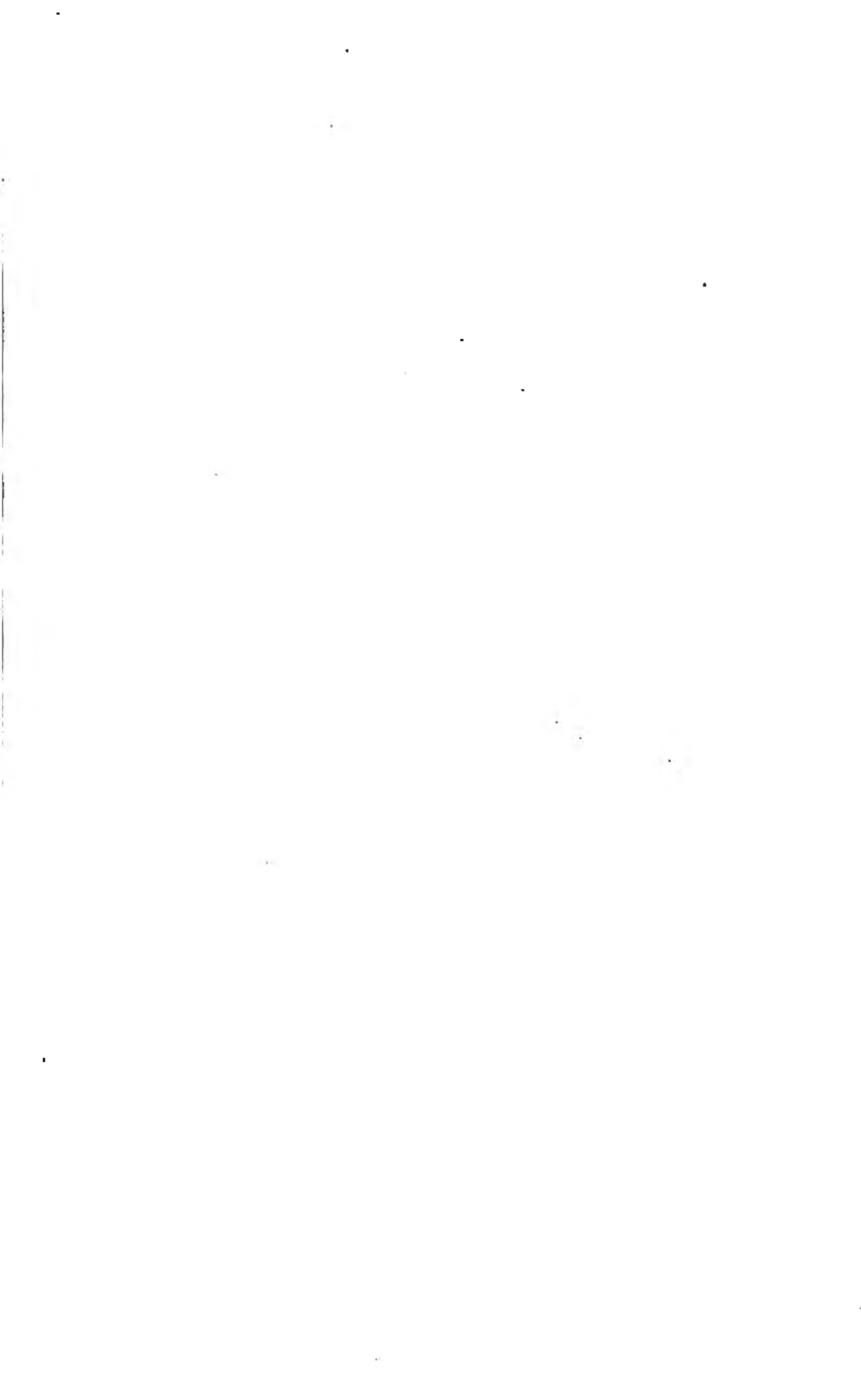
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Eng. L. H. H. H. H.







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A  
**DIGEST**  
OF  
**THE LAWS OF ENGLAND.**

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**VOL. VI.**



*A. Browning*

A

**DIGEST**

OF

**THE LAWS OF ENGLAND.**

BY THE RIGHT HONOURABLE  
**SIR JOHN COMYNS, KNIGHT,**  
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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THE FIFTH EDITION, CORRECTED,  
(WITH CONSIDERABLE ADDITIONS TO THE TEXT)  
AND CONTINUED FROM THE ORIGINAL EDITION TO THE PRESENT TIME;  
TO WHICH IS ADDED,  
A DIGEST OF THE CASES AT NISI PRIUS,  
BY ANTHONY HAMMOND, Esq.  
OF THE INNER TEMPLE.

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THE FIRST AMERICAN, FROM THE FIFTH LONDON EDITION,  
WITH THE ANSWERS OF  
THE PRINCIPAL AMERICAN DECISIONS.  
BY THOMAS DAY, Esq.

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VOL. VI.  
PLEADER—PLURALITY.

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PHILADELPHIA :  
J. LAVAL AND SAMUEL F. BRADFORD,  
AND  
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NEW-YORK.

1825.



**SOUTHERN DISTRICT OF NEW-YORK, ss.**

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**JAMES DILL,**

*Clerk of the Southern District of New-York.*

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A

**DIGEST**

OF THE

**LAWS OF ENGLAND.**

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*[The figures in this work refer to the original pages as numbered at the bottom.]*

**PLEADER.**

**(A) THE ADVANTAGE OF PLEADING.**

IT is one of the most honourable, laudable, and profitable things in our law, to have the knowledge of well pleading in actions real and personal. Lit. s. 534.

Plea (from the Saxon *pleo* or *pleoh*, i. e. *juris actio*) comprehends all that every party to the action alleges in court. Blo. Nom. Lex. Verb. Plea.

Pleading is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence. 3 T. R. 159.

But the evidence itself by which an allegation is to be proved, need not be stated. 3 T. R. 60.

Though legal rights depending upon rules of practice may be pleaded. 16 East, 39.

The use of pleading is to reduce the matters in litigation to a single point. 3 T. R. 684.

The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic ; and so appear, when well understood and explained ; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane. 1 B. M. 316.

And in the absence of decided cases, the books of entries and the returns of writs, are the best authorities. 2 T. R. 10. ; 3 T. R. 161.

And of this rolls are made.

Antiently the writ was entered on a roll, and the tenant or defendant sometimes might appear at the day given by the roll. 1 Sal. 64. Vide post, (B 6.)

Now there are only, the imparlance roll, on which are entered the declaration and imparlance.

The plea roll.

By rule, M. 1654. in C. B. the rolls of Easter term shall be brought in to the prothonotary entered and docketted on or before the first day of Trinity term, and the rolls of every other term, ten days before [\*]the essoign day of the next term, on pain of 10s. for each roll wanting; the rolls of Easter term shall be delivered by the prothonotary to the clerk of the warrants within six days, and of other terms before the essoign day, and the clerk of the warrants in five days shall deliver them to the clerk of the essoigns. (Vide Rules and Orders of C. B. 10. 11.)

By rule, P. 34 Car. 2. the rolls of Easter term shall be brought in by the first day of Trinity term, those of Trinity term by Michaelmas day, those of Michaelmas term by the 6th of January, and those of Hilary term, four days before Easter. (Vide Rules and Orders of C. B. 85.)

By rule, P. 5 W. & M. the rolls of Easter term shall be brought in to the clerk of the essoigns before Trinity term, and of every other term before the essoign day of the next term. (Vide Rules and orders of C. B. 113.)

And no roll ought to be received *post terminum*, without the leave of the court on motion. 1 Sal. 88.

By the st. 36 Ed. 3. 15. all pleadings in the king's court, or any other, shall be debated and adjudged in English, and enrolled in Latin.

Pleadings were antiently pronounced by the counsel, *ore tenus*, and minuted down by the prothonotaries, and afterwards entered of record in the Latin language.

And Latin comprehends not only that which is allowed by grammarians, but also words of signification well known to the sages of the law: as *messuagium*, *loftum*, *guardinum*, &c. 10 Co. 133. a.

So, the words newly invented with an *Anglice*. 10 Co. 133. a. Vide Abatement, (H. 2.)—Action upon the Case, (G 4.)—Amendment, (D 2.)—Obligation, (B 3. 5.)

But an addition in an indictment, &c. by English words will be well. 1 Sid. 191. Vide Indictment, (G 1.)

So, a return of a proceeding. in English, on a writ of error to Berwick, where the entry ought to be in English, is good. R. 1 Sal. 269.

And by the st. 4 G. 2. 26. all writs, process, and returns, and proceeding thereon, all pleadings, rules, indictments, informations, inquisitions, verdicts, records, patents, &c. bonds, fines, &c. and all proceedings relating thereto, &c. in courts leet, courts baron, or any court of justice in England, or the Exchequer in Scotland, or which concern the administration of justice, &c. shall be in English only, and written in a legible hand, close, in words, at length, and not abbreviated, on pain of 50*l*.

So, by the st. 5 G. 2. 27. & 6 G. 2. 14. in actions under 10*l*. or under and above in Wales.

But these acts extend not to the usual method of writing numbers by figures, common abbreviations, names of writs, or technical words. Vide the st. 6 G. 2. 14. s. 5.

## (B) APPEARANCE.

### (B 1.) What shall be.

The first act of parties in court is, that the defendant appears to the process against him.

[\*]When a writ issued out of the king's bench, it was entered upon a roll; so that though the officer had not returned the writ, yet the defendant might have ap-

[\*2] [\*3]

peared at the day given by the roll, and that either to save himself from corporal pain by imprisonment, or to prevent the loss of issues, or to save his freehold or inheritance. Tidd, 262. Co. Litt. 135. a. 1 Salk. 64.

And so it was in the common pleas ; where they entered the writ upon a roll, by way of recital, viz. dominus rex misit breve suum clausum, in hæc verba, &c. Ibid.

If a man abroad enters into a bond, conditioned for his appearance in B. R. at his arrival in England, to answer to any demand that may be made against him, by or on the behalf of A. ; the court, to prevent forfeiture of his bond, will admit his appearance, and direct him to enter into recognizance with sureties to answer the demands in the condition. 1 B. M. 398.

And the appearance is, when the defendant shows himself in court, in person, or by his attorney, ready to answer to the action.

And he ought to enter his appearance by filing common bail, or special bail when it is required. Pr. Reg. 40.

Appearance differs from putting in bail, which is the act of the court itself. Tidd, 262. 1 Salk. 8.

An appearance is either voluntary or compulsive.

A voluntary appearance is of no effect in king's bench, unless the plaintiff's attorney, within fourteen days after such appearance, sue out a writ of *latitat*, or bill of Middlesex, where the defendant abides in that county. Tidd, 262. 4 R. T. 4 W. & M. reg. 1 K. B.

Which rule, however, cannot be taken advantage of by any but the defendant, unless some particular fraud be alleged. Tidd, 262. 1 M. & S. 408. (a.)

In C. B. it is a rule, that no bail be put in for any party against whom no writ or process is sued out without leave of the court. Tidd, 262. R. H. 14 Jac. 1. reg. 2. s. 4.

And no bail is required in that court, but a common appearance only, if the defendant appear upon a summons, attachment, or distress, or by *supersedeas quia improvide*, &c. Tidd, 262. R. M. 1654. s. 12. C. B.

Bail to the action are common or special.

In K. B. by bill, common bail must be filed in all cases where special bail is not necessary, or has been dispensed with in the court. Tidd, 263.

They are particularly required in ejectment, for the casual ejector. R. T. 14 Car. 2. R. M. 33 Car. 2. K. B.

And to authorise judgments by covenant of attorney, default, or *non sum informatus*. R. H. 1 W. & M. R. T. 4 W. & M. reg. 2 K. B. Tidd, 264.

These bail are merely nominal. Tidd, 264.

In C. B. there is no common bail ; but in that court, and also in K. B. by original, a common appearance is entered for the defendant, in cases where special bail is not necessary. Tidd, 264.

For preventing inconveniences which happened to plaintiffs, by the defendant's omission to file common bail, according to the ancient usage and course of the court, there is an old rule in K. B., that all clerks, &c. do, within ten days after the end of every term, deliver to the secondary, a note of all such appearances as have been made unto them the term before, and by whom they were made ; so that the person appointed to enter the bails, may see whether they are filed for such appearance or not. R. T. 1657. reg. 2. K. B. Tidd, 268.

Nothing is a performance of the condition of the bail-bond, but putting in bail above. 5 Burr. 2683.

When special bail shall be required, vide Bail, (K 4.)

[\*] And therefore, the plaintiff cannot declare in B. R. until a *committitur* of the party is made, or bail put in. 1 Rol. 581. l. 10.

Nor, in C. B. till bail is put in, or the party is brought into court by *habeas corpus*.

But by the st. 4 & 5 W. & M. 21. a declaration may be delivered to a prisoner or gaoler, &c.

And by the st. 12 Geo. 29. where the cause of action amounts not to 10*l*. on affidavit of process being served, if the defendant appears not in four days (by st. 5 Geo. 2. 27. in eight days) after the return, the plaintiff may file common bail, and enter an appearance, as if the defendant had appeared.

So, if the attorney for the defendant accept a declaration from the plaintiff's attorney, it shall be an appearance for the defendant. Pr. R. 39.

If he undertakes that he will appear, after a writ taken out, it shall be an appearance. Mod. Ca. 42.

If an attorney has undertaken to appear, the court will oblige him to do it, even though he had no authority from the defendant. Str. 693.

But if the tenant or defendant be in court, and says that he will not appear; this is not an appearance. 1 Rol. 580. l. 15.

So, if the tenant in an assise makes default and another appears for him as his bailiff, and he comes into court, and disavows him to be his bailiff; this is no appearance; for he comes for another purpose, viz. to disavow his bailiff. 1 Rol. 580. l. 20.

So, if the attorney accepts the declaration for the defendant, if he approves of it; it shall not be an appearance, if he afterwards sends back the declaration. Pr. R. 41.

So, if before the writ issues, he undertakes that he will appear; it is not an appearance, though the writ be afterwards shown to him. Mod. Ca. 42.

So, if he undertakes, after the writ is sued out, but afterwards refuses, he shall be compellable to enter an appearance; but it is no appearance till it is entered. Mod. Ca. 86. [2.]

So, it is not an appearance if it is not recorded; for, whether he appeared or not, ought to be tried by the record. Bro. Default, 32. R. Cro. El. (466.) per two J. Keilw. 180.

The appearance of the defendant is triable by the record. Cro. Eliz. 466. Tidd, 263.

And in C. B. it is a rule, that all appearances for defendants upon writs of *capias*, *alias*, and *pluries*, issuing out of that court, ought to be entered of record, or otherwise they are not warranted by the course of the court; neither can the defendant, if he have been arrested, plead *comperuit ad diem* in discharge of the sheriff's bond taken for his appearance. R. M. 14 Jac. 1. reg. 2. C. B. Tidd, 263.

By that rule, the appearance is required to be entered with the proper filacers; but there does not seem to be any appearance roll, or entry of the defendant's appearance, excepting the statement of it on the recognizance roll, or on the imparlance plea, or issue roll, and the entries in the filacers' books: which entries however cannot be considered as records. Tidd, 263.

In an action against a bailiff and commonalty, it is not an appearance, if the bailiff appears without the commonalty; for they are but one corporation. 1 Rol. 582. l. 30. [3.]

[\*] A corporation aggregate cannot appear in any other manner than by attorney. Bro. Corp. 28.

Nor, in an action against husband and wife, if the husband appears without the wife, or *e contra*. Vide post, (B 4. 10.)

Appearance cures all errors and defects in process. Barnes, 163. 167. 415. 424.

### (B 2.) Where it shall be entered.

An appearance on a *capias* in C. B. shall be entered in the filazers' office, out of which it issued. Compl. Att. 31.

[\*5]

On an attachment of privilege, it shall be entered in the remembrance roll of the prothonotary out of whose office it issued. *Ibid.*

By the st. 5 & 6 W. & M. 21. s. 37. (and 9 & 10 W. 3. c. 25. s. 33.) the defendant shall cause an appearance or common bail to be entered or filed in eight days after the return of the process, on pain of 5*l.* to the plaintiff, for which judgment shall be awarded immediately, and execution taken out.

By the st. 4 & 5 Ann. 16. the attorney for the plaintiff or demandant, shall file his warrant of attorney the same term he declares; and the attorney for the defendant or tenant the same term he pleads.

### (B 3.) How it shall be enforced.

*As to what process shall be served; wherein of detainers.*—Service of special original is not sufficient, it must be of process against the person; or plaintiff may have *pone* and distress on his original. Barnes, 407. 410.

Original once used (though improperly, as by serving copy) cannot be afterwards used. Barnes, 417.

To charge a defendant already in custody with a new suit in vacation-time, plaintiff must file a bill as of the preceding term, and then deliver or leave a copy of declaration as of preceding term, and make affidavit of it; there is no occasion for *habeas corpus ad respondendum*. *Hills v. Kenrick*. T. 33 & 34 G. 2. 2 B. M. 1048.

If defendant is regularly entitled to be superseded, (the order for his being superseded having become absolute two days before the end of a preceding term) yet is not actually superseded, but remains in custody of the marshal, and on the 5th day of next term, a declaration is delivered to him at the suit of another plaintiff, he is well charged. *Hutchins v. Kenrick*. T. 33 & 34 G. 2. 2 B. M. 1048.

But if defendant in custody at the suit of plaintiff only, has a *supersedeas*, plaintiff cannot charge him with a new declaration. Barnes, 363.

If defendant is in custody at suit of several plaintiffs, one may discontinue, pay costs, and serve defendant in custody with common *capias*, and notice to appear, and for want, appear, and sign judgment for want of plea. Barnes, 392.

A prisoner, on a charge of felony, may be charged with a *latitat*. *Daintree v. Justice*, H. 9 G. 2. B. R. H. 190.

So, a convict on an act working no forfeiture, ordered to be pardoned on condition he transports himself, may on motion be charged in custody, in a civil action, but not held to bail, nor have execution against his person; for that would prevent his performing the condition of his pardon. *Coffin v. Gunner*. T. 4 G. 2. Str. 873. *Ld. Raym.* 1572. *Fost.* 61. 1 *Wils.* 217. 4 *T. R.* 316.

But the court will not take notice of the king's intention to pardon, though signified by the attorney-general. *Macdonald's case*, 1747. *Foster*, 61.

[\*] So, a prisoner, upon conviction for a libel, being in contempt upon an injunction of chancery, may be charged with an attachment; attorney-general consenting. *Basket v. Rayner*, M. 9 G. 2. B. R. 170.

*As to the form of the process.*—The court will not set aside proceedings and order the bail-bond to be delivered up, because a defendant has been arrested on a special *capias*, in which as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted. *Howell v. Coleman*, 2 Bos. & Pull. 466.

But if the *latitat* be sued out against the defendant by one Christian name, and the *alias* by another, and the plaintiff afterwards proceeds, the court will set aside the proceedings for irregularity. 3 *T. R.* 660.

If the date is omitted, if it is to appear before the king's justice, (instead of justices,) or not fifteen days between *teste* and return, proceedings shall be staid. Barnes, 420. 426, 427.

The court refused to set aside a bill of Middlesex, which was to answer plaintiff in a plea of debt instead of trespass. 2 *T. R.* 513.

And an *ac etiam* to answer in a plea of trover, and for converting the goods of



plaintiff; the cause of action is here sufficiently expressed, to hold to bail under 13 C. 2. c. 2. *Callaghan v. Harris*, H. 9 G. 3. 2 Wils. 392.

So, if the writ is not directed to the sheriff of any county, (yet advantage may be otherwise taken. *Semb.*) *Barnes*, 404.

By 2 Geo. 2. c. 23. s. 22. every copy of any writ or process, that shall be served on any defendant, shall, before the service thereof, be subscribed or indorsed with the name of the attorney or solicitor, who shall be retained or employed by the plaintiff in such writ or process.

Hence, attorney's name not being to copy of process, proceedings staid. *Barnes*, 415.

But this does not extend to the case of an attorney suing by attachment of privilege.

Attorney's name need not be annexed to the sheriff's warrant. *Barnes*, 407. 412. 414.

If an action be against an officer of a court, he ought to appear of necessity, otherwise he shall be condemned; for he is always present in court. 1 Rol. 580. l. 22. 8 H. 6. 16. a.

As, an attorney; for being upon record, he is always present in court.

So, a sheriff upon his account. 1 Rol. 580. l. 25.

So, a man who is a prisoner in the same court. 8 H. 6. 16. Bro. Default, 36.

Otherwise, if he be a prisoner in another court. 1 Rol. 580. l. 29.

And therefore, if such a one be brought in by *habeas corpus*, there is no occasion for an appearance. Bro. Default, 33. 36.

By the st. 13 Car. 2. 2. sess. 2. any, having cause of personal action against a prisoner in the Fleet, may sue forth his original and have a *habeas corpus* directed to the warden to bring up the prisoner at a certain day in term before the just. of C. B., and put in a declaration on such original against the prisoner present at bar, who shall be bound to appear in person or by attorney; and if he does not plead on a rule given to be out in eight days after appearance, judgment by *nihil dicit* shall be entered against him.

By the st. 4 & 5 W. & M. 21. if any be arrested on any writ out of the courts at Westminster, and detained for want of sureties for his appearance, the plaintiff, before the end of the next term, after such process shall be returnable, may declare and cause a copy of a declaration [\*] to be delivered to the prisoner or gaoler in whose custody he is; and if the prisoner does not appear and plead, the plaintiff shall have judgment, as if he had appeared and refused to plead.

If a man arrested upon process is bailable and can find surety, the sheriff dismisses him, if common bail is sufficient on the undertaking of some attorney of the same court to appear for him; if special bail is required, the sheriff takes a bond with surety for his appearance at the return of the process.

By the stat. 13 Car. 2. 2. sess. 2. the sheriff shall not require a bond above the penalty of 40*l.* for appearance upon an arrest or process out of B. R. or C. B., unless the cause of action be specially expressed in the writ.

After which statute the clause of (*ac etiam billæ*) was inserted in process out of B. R.

And afterwards, by rule of court before North Ch. J., it was inserted in process out of C. B. Comp. Sol. 67.

*In relation to the sheriff.*—The sheriff takes bail at his peril; and on the common rule, he must either bring in the body, or justify good bail in court. *Wolfe v. Collingwood*, H. 23 Geo. 2. 1 Wils. 262.

[\*7]



If the sheriff brings defendant in person into court, they commit him charged with the *cap. ad. respond.* Barnes, 392.

By the stat. 12 Geo. 29., amended by 5 Geo. 2. c. 27., made perpetual by 21 Geo. 2. c. 3., if the cause of action amounts not to 10*l.*, or in inferior courts to 40*s.*; and now, by 19 Geo. 3. c. 70. to 10*l.*, the same as in superior courts; the plaintiff shall not arrest, but shall personally serve the defendant with a copy of the process, and if an appearance be not entered in four days after the return of the process, on an affidavit of service filed, shall enter a common appearance, and proceed as if the defendant had appeared.

By the stat. 5 Geo. 2. 27. if not entered in eight days.

*As to the notice to appear.*—Notice to appear must be given with all process served. Barnes, 404.

And though considered that, in debt, if it is above 10*l.* there is no occasion to put the notice to appear at the bottom of the process, under the stat. Geo. 2. 1 Wils. 22.

Yet the rule now is, that the English notice to appear, must be added to all common process where the defendant is not held to bail, whether the cause of action do or do not amount to 10*l.* 7 T. R. 337.

And though, if there is no notice subscribed to the copy of the process served, it is irregular; yet if defendant's attorney takes the declaration out of the office, and pays for it, it is a waiver of the irregularity. *Morgan v. Luckup*, P. 9 Geo. 2. B. R. H. 242.

If there is variance between the name in process and in notice, proceedings shall be staid. Barnes, 298. 2 B. & P. 38.

So, if the notice is directed to plaintiff, instead of defendant, it is faulty; or if the word *next* is omitted, or *next* inserted instead of *instant*. Barnes, 306. 308. 310. 409. 411. 419.

But this list is exploded; and notice is good without *instant*, *next*, or *year*. Barnes, 425.

So, if the defendant's name is not put to the notice at the bottom of *latitat*, it is bad, and shall be quashed. *Behema v. James*, T. 19 Geo. 2. 1 Wils. 104.

The day inserted in the notice to appear to a common *capias*, must be the return-day of the writ. 2 B. & P. 340.

Notice on the copy of process must be to appear on the *essoin* day, though a Sunday. Barnes, 293, 294, 295.

[\*] Notice to appear on the *quarto die post*, is good. 1 H. B. 630.

It must be given before nine at night. Barnes, 310.

*As to the mode of service.*—It is not necessary to show defendant the original writ, but only to deliver him a copy. *Per curiam*. *Worley v. Glover*, M. 4 Geo. 2. Str. 877. Barnes, 302. 422.

Yet, if defendant served with copy of process, demand to see the original process, and is refused it, it is not good service. *Semb.* B. R. H. 138.

Service of copy of writ, except what relates to other defendants, not good. Barnes, 405.

Copy of process tendered to defendant at his house, and left there, is good service. Barnes, 278.

So, copy of process put through keyhole to defendant, who knows the contents, good service. Barnes, 405.

So, copy sent by letter, if defendant takes it out and reads it, is good service. Barnes, 422.

*As to the time of service.*—Service of mesne process on the return-day, is good in C. B. as in B. R. General rule, P. 8 Geo. 3. 2 Wils. 372,

Though after the court is risen. *Hall v. Gatton*, H. 2 Geo. 2. *Moss v. Powel*, T. 11 & 12 Geo. 2. *Weyburn v. Neale*, M. 19 Geo. 2. *Maud v. Barnard*, T. 32 & 33 Geo. 2. 2 B. M. 812.

But, if process is dated subsequent to service, it is irregular. Barnes, 408.

Service of a *latitat* at eight o'clock in the evening of the return-day, is good, though the declaration be left in the office in the course of the same day. 1 T. R. 191.

And the rule is, that all notices, rules, or orders, in any cause depending in B. R. shall be served, and all proceedings and pleadings shall be delivered, and served by or before ten of the clock at night: and every service and delivery after such hour shall be void. Reg. Gale, B. R. M. 41 Geo. 3. 1 East, 132.

A defendant, however, must not be served with process while he is attending his cause at any of the courts at Westminster. Str. 1094.

*As to the place of service.*—A bill of Middlesex should not be served out of the county of Middlesex. Dougl. 384. 1 T. R. 187. Vide 6 T. R. 74.

But a *latitat* may be served in any county. 1 T. R. 187.; 8 T. R. 235.

Service is good, though in a liberty, and not by proper officer; but the party injured may bring action. Barnes, 404.

But process directed to the sheriff of Kent served in the Cinque ports is bad; it should be *testat. cap.* to the constable of Dover castle. Barnes, 422.

If it is doubtful, whether the place where defendant was served be in the county where process issued, or not, it shall be deemed good service, especially if defendant promised to appear to any process. Drew v. Marriott, T. 17 Geo. 2. 1 Wils. 77.

*As to an appearance under the statute.*—The plaintiff cannot file common bail according to the statute after the succeeding term after the writ is returnable. 2 T. R. 719.

Affidavit of service must be made, or proceedings will be staid. Barnes, 412.

If the defendant had been right named, both in the writ of *capias ad respondendum*, and in the declaration delivered *de bene esse*, and in the affidavit of service of the writ, but not in the appearance entered by the plaintiff according to the statute, this may, on application to the court, be amended. 3 Wils. 49.

*As to the time of appearance.*—If on defendant's not appearing to a writ of Easter term, plaintiff files common bail as of Trinity term, the cause is out of court, and judgment must be set aside. Edgar v. Farmer, T. 8 Geo. 2. B. R. H. 138.

[\*] If an attorney of B. R. or C. B. accepts a warrant (or undertakes to appear, Mod. Ca. 86.) or subscribes a process or warrant to make an appearance, and does not enter an appearance accordingly, he shall be subject to an attachment, or to be erased out of the roll, and the party cannot countermand appearance after retainer. Ord. Compl. Att. 292, 293.

If the party afterwards countermands the warrant, the attorney shall be compellable to enter an appearance. Pr. R. 38.

But if there are several defendants, the attorney is bound only to appear for such of them as give him authority. Pr. R. 39. 1 Sal. 87.

If upon an arrest, the sheriff takes surety for appearance, and the party does not appear, the sheriff may be amerced, on a rule being given to bring in the body; and so *toties quoties*. Comp. Att. 311.

But the usual way is to assign the bail-bond to the party. Vide Bail, (K. 5.)

And now, by the stat. 4 & 5 Ann. 16. if, on an arrest by process from the courts at Westminster, the sheriff, &c. takes bail, he, at the request and costs of the plaintiff, shall assign to him the bail-bond, &c. by indorsing it under his hand and seal in the presence of two witnesses, which may be done without stamp, if stamp before put in suit; and if such bond be forfeited, the plaintiff may sue it in his own name, and the court may, by rule or rules of court, give such relief to the plaintiff or defendant in the original action, or to the bail, as is reasonable; which rule shall be in the nature of a defeasance to the bail-bond.

But an action upon the case does not lie against the sheriff for a false  
[\*9]

return; for he is compellable to accept bail by the stat. 23 H. 6. 10. R. 2. Sand. 60. 1 Sid. 23. 439. R. 1 Rol. 82. l. 50. 807. l. 50. R. Noy. 39.

If the plaintiff does not take an assignment of the bail-bond, but proceeds, by amerciamment of the sheriff, to enforce the appearance of the defendant, he ought to give 4*d.* to the sheriff to make a return of the writ, and if he returns *cepi corpus*, or *reddidit se*, he shall give a rule to the sheriff to have his body on pain of 40*s.*; and if he has it not, he may have an *habeas corpus*, upon which the sheriff can return nothing, (if he has not the body,) but *languidus in priona*, and then shall issue a *duces tecum licet languidus*; if the sheriff does not return the *habeas corpus*, he shall be amerced; and so *toties quoties*, and the amerciaments may be estreated into the crown office, and from thence into the exchequer. Compl. Att. 311. Vide Bail, (K 5.)

But after the estreat of the amerciaments, they may be compounded or discharged, upon motion in the exchequer, and a certificate of the plaintiff's attorney that the debt is satisfied. 1 Sal. 54.

*Effect of a rule to stay proceedings.*—Where a rule to set aside proceedings for irregularity, and to stay proceedings in the meantime, is obtained; the proceedings are suspended for all purposes till the rule is discharged. 4 T. R. 176.

*Waiver of irregularities.*—If a defendant is served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him, and serve him with notice of declaration by his right name, and proceed to judgment and execution, the court will not set aside the proceedings for irregularity, on the ground that the defendant never appeared, [\*] because he ought to have pleaded such misnomer in abatement. 3 East, 167.: leave however was given to defend, on payment of costs, the party swearing to a mistake of the practice and to merits. Ibid.

So, if the copy of *latitat* served is only to answer A. without saying in a plea of trespass, or showing any cause of action, and defendant takes the declaration out of the office, it amounts to an appearance, which is a waiver of the defect in the process. Caswall v. Martin, P. 10 Geo. 2. B. R. H. 369.

But if the plaintiff's name is omitted in the writ, defendant may at any time apply to set aside proceedings, for it is no process at all; otherwise, if service of writ is irregular only, for there he must apply as soon as possible after notice. Thomson v. Browne, T. 10 & 11 Geo. 2. Andr. 16.

Appearance entered by plaintiff, does not cure process being served on a wrong person. Barnes, 406.

*The loss of a bill may be supplied.*—It appearing that the bill in a penal action had been taken off the file, the court permitted it to be supplied from a copy taken by the plaintiff himself. 8 T. R. 476.

*Other matters.*—For the better distinguishing by whom common bail shall have been filed, it is ordered, that “in all cases where common bail shall be filed by the plaintiff for the defendant by virtue “of the act, these words shall be written on the bail piece, viz. ‘filed according to the statute,’ or words to the like effect.” Tidd, 268.; 2 Str. 1027.; C. T. 207.

And where the plaintiff files common bail for the defendant, on any day between the second and sixth of November, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the essoin day of Michaelmas term. Tidd, 268. 5 T. R. 65.

It should also be remembered, that by the statute 51 Geo. 3. c. 124. s. 2. (continued by the 57 Geo. 3. c. 101.) if the defendant, on being personally served with the summons or attachment by original, do not appear at the return of such writ or of the *distringas*, as the case may be, or within eight days after the return thereof, the plaintiff, upon affidavit being made and filed in the proper court, of the personal service of such summons or attachment, or of the due execution of such *distringas*,

&c., may enter a common appearance for the defendant, and proceed thereon as if he had himself entered his appearance. Tidd. 269.

And by the mutiny acts, a common appearance may be entered by the plaintiff in actions against volunteer soldiers. Tidd. 269.

The plaintiff's attorney, in either court, may enter a common appearance, or file common bail for the defendant, according to the statute, without entering or filing of record any memorandum or minute of the defendant's warrant, pursuant to the 25th Geo. 3. c. 180. Tidd. 269.

But the defendant's attorney must not plead or carry on any further proceedings in the action, until such memorandum or minute shall have been delivered to the proper officer, to be entered or filed of record, according to the directions of the act. Ibid.

#### (B 4.) In an action against husband and wife.

Service of husband good for both, and plaintiff may enter appearance for both. Barnes, 406. 412.

In an action against a husband and wife, if the husband be taken on the *capias* or exigent out of B. R., he shall remain in prison till bail given for himself and his wife. 1 Rol. 583. l. 7. 20. 1 Sal. 115.

So, if he appears on the exigent. 1 Rol. 583. l. 5. R. Cro. El. 370.

So, if he appears on the original. 1 Rol. 583. l. 15.

So, if the husband is arrested on a *latitat*. 1 Rol. 583. l. 30. Pr. Reg. 66.

[\*] And if the husband be an attorney, &c., he cannot appear in person and put in bail for his wife, but he ought to put in bail for himself and his wife; for he shall not have privilege in an action against him and his wife. R. 1 Rol. 580. l. 45. Vide Attorney, (B 17.)

So, if the action be against husband and wife as executrix. R. Cro. El. 118. 1 Leo. 138.

So also, in an action against husband and wife in C. B., if the husband comes in upon the *capias* or exigent, he must put in bail for his wife. Bro. Default. 7. Bro. Baron and Feme, 5. 8. 37. 1 Rol. 583. l. 10. cont. for a *supersedeas* shall go for the husband, and he shall go without day; for he cannot answer without his wife, and process shall continue against her till she be waived. R. acc. for the appearance of the husband shall not be recorded, nor a *supersedeas* allowed for him, till he gives an appearance also for his wife. 1 Leo. 138. Cro. El. 118. R. Hob. 179.

So, if the husband be taken on a *capias* or exigent. Bro. Baron. and Feme, 1. 10. R. Cro. Car. 58.

So, if the husband be outlawed and sue a charter of pardon and a *scire facias* upon it; it shall not be allowed without his wife. Bro. Baron and Feme, 10. 19. R. Cro. Car. 58.

So, in an action against husband and wife, if the husband appears by attorney, he shall enter an appearance for both. 1 Brownl. 46. Mod. Ca. 86. 1 Sal. 115.

In C. B. it is said, that if husband and wife be joined in the writ, and the husband enter an appearance for himself only, the plaintiff cannot afterwards sign judgment for want of a plea, without making a *demand* of a plea. H. Bl. 235.

So, if he gives bail, he shall give it for both. Mod. Ca. 17. 1 Vent. 49. 1 Sal. 115.

In an action against husband and wife, if the wife be taken on the *capias*, and not the husband, an exigent shall issue against the husband, *et idem dies datus* to the wife. Bro. Baron and Feme, 1. But it is said that the wife shall go without day. Ibid. 10. 11. Vide post. (B 10.) R. 2 Cro. 445. Cro. Car. 58. Hut. 86. Semb. 1 Vent. 49.

[\*11]

So, if the wife renders herself on the exigent. Cro. Car. 58. Hut. 86.

So, if the husband was before in custody, and the wife is taken, and *non est inventus* returned for the husband; the wife shall be discharged upon common bail, and other process shall go against the husband with an *idem dies* to the wife. R. 1 Sal. 115.

If the husband and wife are both taken upon the *capias*, the husband only shall be committed, if he does not give bail for himself and his wife, and the wife shall be discharged. Adm. 1 Lev. 1. Semb. cont. 1 Vent. 49. Acc. 1 Lev. 216.

If the husband on the exigent be returned *outlawed*, the wife shall go without day, for the process is determined. Cro. Car. 58. Hut. 86.

If the process continues till the husband is outlawed, and the wife waived, and she be taken upon process, and the outlawry of the wife is pardoned, but of the husband not, she shall be discharged from her imprisonment. Dy. 271. b. 1 Sid. 21.

[\*] If the husband be taken, or renders himself on the exigent, and the wife is returned *waived*, the husband shall go without day. Cro. Car. 58.

If the husband and wife are both taken, the wife shall be discharged, though the action be against them for the debt of the wife *dum sola*, and she was first in custody. R. 1 Dev. 216.

So, if both are taken in execution. R. 1 Lev. 51.

But if there be judgment against a woman, who afterwards marries, execution goes against the wife only, and she shall be in execution. R. 2 Cro. 323. 2 Bul. 80.

So, in B. R. if the wife be arrested and not the husband, the husband is not compellable by the course of the court to appear for himself and his wife. Per Cur. 1 Rol. 583. l. 30.

So, in B. R. where the husband is compellable by the course of the court to appear for himself and his wife, it is in the election of the court whether he shall be compelled to give bail for his wife; for all bails are in the discretion of the court. R. 1 Rol. 583. l. 22.

(B 5.) At what time the appearance ought to be :—At the day of the return of the writ.

The defendant ought to appear, regularly, at the return of the writ or process. Co. L. 135.

And if he does not appear at the return of the first process, he may at the return of any subsequent process.

By rules upon the st. 4 & 5 W. & M. 21., if a declaration be delivered to a prisoner, according to that statute, before *Mens. Pas.* or *Crast. Animar.*, and affidavit of it filed with the proper secondary, the defendant ought to enter his appearance with the proper officer within ten days after Easter or Michaelmas term, otherwise upon a rule given to appear and plead, to be expired in eight days, and to be given after the process upon which he was taken is returned, and on a copy of the affidavit produced to the prothonotary, and a certificate that no appearance is entered, judgment shall be signed against the defendant. Vide post. (C. 4.—E. 41.)—(Vide Rules and Orders of C. B. 114, 115.)

So, if a declaration be delivered in Hil. or Trin. term, or upon or after *Mens. Pas.* or *Crast. Animar.* in East. or Mich. term, the defendant ought to enter his appearance within two days before the *essoign-day* of the next term. Vide Rules and Orders of C. B. 115.



So, in replevin, if the process continues till a *pluries* issues out of chancery, upon which the sheriff returns in bank, property claimed, though no day is given by this writ to the parties, but to the sheriff to excuse his contempt in not executing the writ before, yet the parties may appear: otherwise, there would be a great mischief; for there is no other subsequent process. R. 1 Rol. 581. l. 40. Dub. Dy. 246. a.

So, if a *pluries* was returnable in Mich. term, and nothing is done till East., the parties may then appear if they will. 1 Rol. 581. l. 50.

So, if after a *pluries*, upon which the sheriff does nothing, an attachment issues to the coroners against the sheriff, and they return, that the sheriff is attached, but they cannot have view of the cattle, for [\*]which shall issue a *distringas vic.* and *withernam* of the defendant's cattle; the defendant may appear on the *withernam*. Cont. Bro. Jour. 70. 82. Acc. Dy. 189. a.

Though the very day of the return of the writ be the day for appearance. Dy. 269. b.

Yet, it is sufficient, if the defendant or tenant appears on the *quarto die post*. Co. L. 135. a.

If the attorney does not enter common bail before the end of the term in which he appears, he shall be put out of his office. Ruled 1 Rol. 372.

By the st. 5 & 6 W. 3. 21. and 9 & 10 W. 3. 25. s. 33. the defendant shall cause an appearance or common bail to be entered or filed within eight days after the return of the process on which he is arrested, on pain of 5*l.* to the plaintiff, for which the court shall award judgment immediately, whereon the plaintiff may take out execution.

And if several defendants are arrested, and one of them appears, and the others do not enter their appearance within eight days, judgment for the 5*l.* shall be given against him who does not enter his appearance. Per C. B. Pas. 8 Ann.

But if none of the defendants enter their appearance within eight days, judgment shall be against all only for one 5*l.*; for they may appear jointly, and it shall not be intended they would do otherwise. R. in C. B. Pas. 8 Ann.

*The following is the practice.*—Common bail may be filed, or a common appearance entered, by the defendant or his attorney, or by the plaintiff according to the statute. 12 Geo. 1. c. 29. Tidd, 265.

And it may be filed or entered by the defendant originally or in consequence of a rule of court or judge's order, for discharging him out of custody, on filing or entering it. Ibid. 1 Chit. Rep. 282.

In the king's bench, where the defendant has been served with the copy of a bill or Middlesex or other process thereon, he should file common bail at the return of it, or within eight days after such return, which are reckoned exclusively; and Sunday is not accounted as one of them. Tidd, 265. 5 Geo. 8. c. 27. 1 Burr. 56.

The bail are entered on a piece of parchment called a bail-piece, which is stamped with a half-crown stamp, and filed with the clerk of the common bails; who is required to mark the bail-pieces numerically as they are received. Tidd, 265. 48 Geo. 3. c. 149. 55 Geo. 3. c. 184. R. E. 30 Geo. 3. K. B. 3 T. R. 666.

The defendant having been served with a copy of a *capias* or other process by original in the king's bench, should enter a common appearance with the filacer of the county where the action is laid within eight days after the appearance day, *quarto die post* of the return of the process. Tidd, 265. Imp. K. B. 592.

In the common pleas, the eight days are reckoned from the return day, and not from the *quarto die post* of the return writ. Imp. C. P. 216, 17.

And the appearance is entered with the filacer of the county to which the writ is directed upon a *præcipe* or note of appearance being made out and delivered to him on unstamped paper, which he enters in a book kept for that purpose. Imp. C. P. 216.

And at the time of filing common bail or entering an appearance, the defendant's attorney should deliver to the officer with whom it is filed or entered, a memorandum or minute of his warrant duly stamped. Tidd, 265.

In an action against husband and wife when the husband alone has been [\*]arrested, special bail may justify for him only on his filing common bail for his wife. 1 Chit. Rep. 75.

But when the husband alone has been served with process, he ought regularly to file common bail or enter an appearance for himself and his wife. Tidd, 266. Barnes, 412.

Yet, where he entered an appearance for himself only, the court of common pleas held it to be so far regular as that the plaintiff could not sign judgment without demanding a plea. 1 H. B. 235.

And where, in a similar case, an appearance was entered for the husband only by his attorney, who expressly disclaimed any interference for the wife, and the latter not appearing, an appearance was entered for her by the plaintiff according to the statute, upon which the plaintiff declared against the husband and wife jointly, and the former pleaded for himself only; the court of exchequer held, that an interlocutory judgment signed against both for want of a joint plea was regular. Tidd, 266.

Before the statute 12 Geo. 2. c. 29. common bail could only have been filed or a common appearance entered by the defendant or his attorney. Ibid. 267.

But now by that statute, as altered by the 5 Geo. 2. c. 27. "if the defendant having been served with process, shall not appear at the return thereof or within eight days after such return, the plaintiff upon affidavit of the service of such process made before a judge or commissioner of the court for taking affidavits, or before the proper officer for entering common appearances, or his deputy, (and which affidavit shall be filed gratis,) may enter a common appearance, or file common bail for the defendant, and proceed thereon, as if such defendant had entered his appearance or filed common bail."

The affidavit required by these statutes cannot in the king's bench be taken before a commissioner who is concerned as attorney for the plaintiff; but in the common pleas, it is otherwise. Tidd, 267.

And in the latter court, a common appearance cannot be entered by the plaintiff till the ninth day after the return of the writ; the defendant having all the eighth to enter it. Ibid.

Common bail however should be filed, or a common appearance entered, by the plaintiff for the defendant, of the term in which the writ is returnable or before the *quarto die post* of the first return of the following term, it being holden that till then common bail may be filed or an appearance entered as of the preceding term. Tidd, 267. Ca. t. Hard. 139. Imp. K. B. 561. 2 T. R. 719. 6 East, 314.

And it cannot be filed or entered by the plaintiff in a subsequent term. 2 T. R. 719.

Though if judgment has been irregularly signed without filing common bail for the defendant according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up, yet the defendant having given a *cognovit* is estopped from objecting to the irregularity, if the plaintiff has filed common bail *nunc pro tunc* before the time of making the objection. 7 T. R. 206. Tidd, 293.

If the defendant be sued by a wrong name and do not appear, the plaintiff cannot rectify the mistake by appearing for him in his right name according to the statute. Tidd, 268. 3 T. R. 611. 2 N. R. 132. accord. 1 B. & P. 105. *contra*.



Nor can he appear for him in the name by which he is sued, and afterwards declare against him in his right name. Tidd, 268. 10 East, 328. 11 East, 225. Vide 3 M. & S. 250.

But in the common pleas, if the writ and declaration be against the defendant in his right name, an appearance entered for him by the plaintiff according to the statute in a wrong name, may be amended. 3 Wils. 49. Tidd, 268.

[\*]By accepting the declaration, the want of having entered an appearance is waived. 1 N. R. 309.

### (B 6.) When at the day by the roll.

And if the sheriff does not return his writ, the defendant may appear gratis by the roll, if he be in danger, otherwise to lose his inheritance. 1 Rol. 582. l. 10. Co. L. 135. a.

As, in a *sequatur suo periculo* against a vouchee; he may appear, though the writ is not returned; for otherwise he will lose in value. 1 Rol. 582. l. 12. Bro. Journ. 93.

So, in a *præcipe quod reddat*, &c. Bro. Journ. 1.

So, in an appeal.

So, where the defendant is to have corporal pain if he does not appear. 1 Rol. 582. l. 22. Bro. Jour. 48. 51. 64. 93. Bro. Averment cont. Ret. Vic. Co. L. 135. a.

So, where a defendant gives a bond or surety for his appearance, he shall appear, though the writ be not returned; and there shall be a special entry upon the record, that he appears for the indemnity of himself and his bail. R. 1 Leo. 90. [Vide 1 Wils. 39.]

So, if the court does not sit, or the justices do not come. 1 Leo. 90.

And the ancient course was to enter the writ upon the roll, and then the defendant might appear at the day by the roll. 1 Sal. 64.

So, where the defendant will have other damage, if he does not appear, he may appear at the day by the roll: as, in trespass, after an exigent awarded, the defendant may appear at the day by the roll, though the exigent be not returned. 1 Rol. 582. l. 25.

So, to a return of *withernam* in a *hom replegiando*. Sal. 583.

So, in an *audita querela*, if it be returned *nihil*, &c. 1 Rol. 582. l. 35.

So, in debt, if it be not returned, for fear of a *capias*. 1 Rol. 582. l. 37. Sal. 583.

Or, if it be returned *nihil*, &c. 1 Rol. 582. l. 40.

But the plaintiff is not obliged to count against him, when he appears gratis at the day by the roll to an original. 1 Rol. 582. l. 39. Bro. Jour. 18. 25. Bro. Averment cont. Ret. Vic. 10. 28.

Yet if the sheriff returns *nihil*, &c. and the defendant appears contrary to the return of the sheriff, the plaintiff is bound to count against him. Semb. Bro. Averment cont. Ret. Vic. 1. 11. Bro. Default, 67.

But where the defendant will lose nothing, he cannot appear at the day by the roll, if the writ be not returned; as, if a defendant outlawed be pardoned, and sues a *scire facias* against the plaintiff, which is not returned; the plaintiff shall not appear at the day by the roll, for he loses nothing. 1 Rol. 582. l. 15. Bro. Averment cont. Ret. Vic. 26.

So, in a *scire facias* against the garnishee, he shall not appear at the day by the roll, if the sheriff returns *nihil*, &c. for he shall lose nothing. 1 Rol. 582. l. 27.

So, in error, if the sheriff does not return a *scire facias*, or returns a *tarde*, &c. Bro. Jour. 48. Bro. Default, 64.

[\*15]

So, in a second deliverance. Bro. Averment cont. Ret. Vic. 28.

So, where the defendant will lose nothing but issues. Bro. Averment cont. Ret. Vic. 12. Semb. cont. 21. Acc. Bro. Default, 41. Cont. 64. [\*]And it is said cont. that the defendant may appear at the day by the roll when he shall lose issues. Co. L. 135. a.

So, the defendant may appear at the day by the roll, when he will have damage otherwise, though the writ was not served; as, if a man sues execution on a statute, and the conusor sues an *audita querela* upon the acquittance of the conusee which is not served, but the conusee prays execution; he ought to answer to the acquittance at the day by the roll, though the *audita querela* was not served. 1 Rol. 582. G.

So, in *audita querela* after release of a judgment in trespass. Cont. Bro. Jour. 51. Semb. acc. Bro. Averment cont. Ret. Vic. 25.

So, in a *scire facias* upon a recovery in annuity where *nihil* is returned, the defendant may appear at the day by the roll; for otherwise, upon the first *nihil* there shall be execution against him. Bro. Averment cont. Ret. Vic. 20, 21.

So, The defendant may appear, if the sheriff returns the writ *tarde*. 1 Rol. 582. l. 20.

Or, if he returns *nihil per quod summoniri potest*. 1 Rol. 582. l. 35.

Or, *mandavi ballivo qui nihil inde fecit*. 1 Rol. 582. l. 43.

So, if he returns *non est invent*. Bro. Default, 17.

Or, *languidus in priona*. Bro. Jour, 2,

### (B 7.) When a man, who appears to one process, shall answer to another.

If the defendant be taken on a *capias*, and comes in by *cepi corpus* to one writ, and has a day by distress to two other writs, he ought to answer to the writs in which he has day by distress. 1 Rol. 520. l. 33.

So, if he comes in on a *cepi corpus*, he ought to answer to an action of another person there depending. 1 Rol. 588. l. 30.

So, if a man be brought in by *habeas corpus* out of the Fleet to C. B. he shall answer to an action there depending. 1 Rol. 588. l. 35. Vide ante, (B. 3.)

So, if he be brought in by *habeas corpus* out of B. R. 1 Rol. 588. l. 40.

### (B 8.) When not.

But if the defendant appears *gratis* to one action in B. R. he need not answer to another action there depending. 1 Rol. 580. l. 35.

So, if he appears on a *habeas corpus* upon pretence of privilege, he need not answer to an action there depending against him; for he ought to be discharged or remanded. 1 Rol. 588. l. 45.

So, if he appears to a bad process, as to a *capias*, where a *distringas* lies, and no *capias*, he need not answer. Bro. Default, 11. Cont. per Needham, Bro. Jour. 36.

### (B 9.) When one defendant, who appears, shall answer without the other.

In personal actions against several, if one defendant appears, and the other makes default, he who appears shall make answer without the other.

[\*]And if one only appears and files bail, and the other not, and the plaintiff proceeds against both, it will be error. R. 2 Rol. 46.

But, if bail be omitted by the other, through covin, it shall be amended.  
2 Rol. 46.

So, in ejectment of ward, or ravishment of ward; for those are in the nature of trespass. 1 Rol. 589. l. 15.

### (B 10.) When not.

But in all real actions where the process is by attachment and distress, if one appears, he shall not be put to answer till the other also appears (except where the process is determined against the other); for he who does not appear shall not lose his freehold by the plea of the other. 1 Rol. 589. l. 35.

As, in a *quod permittat* against two. 1 Rol. 589. l. 40.

So, in a *præcipe quod reddat* against two, the one who appears shall not be put to answer till after the return of the *grand cape*. 1 Rol. 589. l. 5.

So, in debt against husband and wife, if the husband appears, and the wife makes default, the husband shall not be put to answer, but the process shall continue against the wife, and *diem dies* be given to the husband. R. 1 Rol. 589, l. 30. Vide ante, (B. 4.)

So, in trespass against husband and wife. Semb. cont. 1 Rol. 589. l. 20. But there the process was discontinued against the wife.

So, if the wife appears and the husband makes default, she shall not answer without her husband. 1 Rol. 589. l. 27. 1 Sal. 115.

So, if the husband is outlawed and the wife waived, and the wife is taken and produces a charter of pardon, the pardon shall not be allowed; for she cannot have a *scire facias* without her husband against the plaintiff to force him to declare against them, and the pardon is conditional *si starect recta in curia*. R. Dy. 271. b.

But, if process be against husband and wife, who appear on the exigent, but the husband refuses bail for himself and his wife; the wife alone may make an attorney to appear for her, to avoid being waived. Dy. 271. b. in marg.

If there is process against two, on a joint cause of action, and one only appears, the other must be outlawed before there can be further proceedings. Str. 473.

### (B 11.) Default of appearance.

If the plaintiff or demandant, tenant or defendant, does not appear in court at the return of every process, or at every continuance, it shall be a default. Co. L. 259. b.

And the general rule is, that where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this even though the writ be not returned as on a *capias*, *exigent*, or *distringas* or *recordari facias loquelam*. 1 T. R. 373.

Or, if he does not cast an *essoign* when he may; for that excuses his appearing till the day to which the *essoign* is adjourned.

Default may be before or after appearance.

If default be before appearance in all *præcipe's quod reddat*, a *grand cape* issues; and at the return, if the tenant does not save or excuse his default, he shall lose the land. Mod. Ca. 4. Lut. 861. Vide Process, (D. 4.)

So, if he does not save his default at the return of the *grand distress*; [\*] where process is by summons, attachment, and distress. Vide Mod. Ca. 8.

Default after appearance is, where the tenant or defendant does not appear at the day given by the court, or at any return of *mesne* process.

If he appears, and afterwards, being demanded by the court the same day, [\*18]

will not appear ; it will be a departure in despite of the court, upon which there shall be judgment against him immediately. Mod. Ca. 8.

So, if the demandant imparls generally, and the defendant does not appear at any time when he is demanded in the same term, it shall be a departure in despite of the court ; for the whole term is but one day. Sho. 22. 66.

So, if an imparlance be to a day certain in the same term, and the defendant does not appear at the day. Mod. Ca. 8. Sho. 66.

So, if the tenant makes default at the return of the process, or day given by continuance to another term, in all *præcipe's quod reddat*, a *petit cape* goes, and if he does not then save his default, there shall be judgment final. Mod. Ca. 4.

Or the demandant may waive the default and proceed by other process. Mod. Ca. 4. 1 Sal. 217.

So, in a *præcipe quod faciat*, &c. there shall be a *distringas ad audiendum judicium*. Mod. Ca. 8.

So, in annuity ; for though it be a personal, in the process it participates of the nature of real action. Mod. Ca. 8.

But in all personal actions, upon a default after declaration, before issue, there shall be a final judgment against the defendant. Mod. Ca. 8. Sho. 65. 1 Sal. 216.

So, after issue upon the second default, by the stat. Marl. 13. & W. 2. 27. R. 1 Sal. 216.

### (B 12.) Of what effect it shall be.

When a default shall be excused, vide infra.

When the default of one shall be the default of another, vide, when the nonsuit of one shall be the nonsuit of another, post, (X. 5.)

When the plaintiff shall be nonsuited upon his default, vide post, (X. 1, &c.)

When an inquest shall be taken by default, vide Enquest, (E.)

When judgment shall be on default, vide post, (Y. 1.) for judgment on default in personal actions : and vide ante, (B. 11.) for judgment in real actions and in process.

The tenant may save his default by waging his law of non-summons, *de quo* vide Abatement, (H. 53.—I. 26.)

Or by excuse, that he was in prison.

By tempest, inundation of water, or bridge broken.

But in personal actions the defendant can never save his default. 1 Sal. 217.

### (C) COUNT.

#### (C 1.) To whom a declaration shall be delivered.

The first act, after the appearance of the parties, &c. is, that the party suing shall count. Th. D. l. 10. S. 5.

In B. R. the course is, that the plaintiff's attorney delivers his declaration to the defendant's attorney, who makes a copy of it, and then redelivers it, when his answer is required. Comp. Att. 314.

[\*] In C. B. the plaintiff's attorney makes a copy of the declaration, and delivers this to the defendant or his attorney. (Vide Comp. Att. 314.)

The delivery of the declaration is the act, not of the court, but of the party. 1 T. R. 116.

Where a defendant keeps out of the way to avoid service of process, and a notice of declaration is sent to him in a letter by the post, which is returned opened and marked "refused;" this is sufficient service. 1 Mars. 8. 5 Taunt. 186.

It is well delivered only from the time of notice. Barnes, 227.

And if he does not know where the attorney or clerk of the defendant may be found, he may deliver it in the prothonotary's office. 2 Mod. Ca. 379.

Or, if the defendant's attorney refuses to pay for the declaration, a delivery in the office with notice to the attorney, is sufficient. 2 Mod. Ca. 379.

In B. R., on special or common bail filed, and notice given, plaintiff's attorney shall deliver declaration to defendant's attorney, who shall pay for it; if he refuses to pay, or his habitation is not known, plaintiff's attorney may leave it in the office with the clerk of the declaration, and give notice; and such delivery is good from the notice. General rule of Trin. 11 Geo. 3. 2 Ld. Raym. 1407.

But where the defendant's place of residence is known, the declaration must be delivered not filed. 7 T. R. 26.

And though the defendant (served with process,) cannot be found, and though his abode is unknown, yet affixing declaration in office will not be good service, unless by leave of the court. 5 Taunt. 777.

In C. B. notice of declaration is only required in actions not bailable. 2 B. & P. 42.

And personal service of a declaration being filed, is not necessary where bail is put in. 3 Wils. 147. 2 Blk. 725.

A communication to the defendant and his attorney, that a declaration was stuck up in the office, is sufficient, without service at the last place of abode. 1 N. R. 279.

But if after due search the defendant cannot be found, the notice of declaration should be served at his last place of abode, if known. 1 B. & P. 214.

Notice of declaration filed in chief, cannot be given until after the return-day of the process. 4 Taunt. 818.; *secus*, notice of declaration filed conditionally, 3 Smith, 421. 3 Taunt. 401.; and though in K. B. the notice must be given after the writ has been served, 12 East, 116.; yet in C. B. the notice and writ may be served together. 3 Taunt. 404.

Notice of a declaration left in the office, must specify the nature of the action in technical terms; if not, judgment shall be set aside. *Graves v. Wise*, T. 31 Geo. 2. 2 Wils. 84.

But it need not state the damages laid. 6 Taunt. 331.

And an irregularity in the notice is waived by taking out a summons to stay proceedings on the bail bond. 1 B. & P. 342.

And by the st. 4 & 5 W. & M. 21., if the defendant be detained in prison for want of sureties for his appearance, the plaintiff may cause a copy of the declaration to be delivered to the prisoner, or to the gaoler in whose custody he is, &c.

So, by the st. 8 & 9 W. 3. 27., if the defendant be a prisoner in the Fleet, the plaintiff, after filing or entering a declaration with the proper officer, may deliver a copy of such declaration to the defendant in any personal action, or to the turnkey or porter of the Fleet prison, &c.

So, if the defendant be in *custodia mareschalli*, the plaintiff may file a bill, and then deliver a declaration to the turnkey. 1 Sal. 345.

[\*] If it be in the vacation, he ought also to make an entry in the marshal's book at his office. 1 Sal. 345.

If the declaration is not delivered to the turnkey (defendant being in prison), a *supersedeas* shall be granted, though the declaration was left in the office. *Greenhouse v. Cleever*, M. 8 Geo.; Str. 474.

A declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney. 2 Blk. 786.

[\*20]



If defendant served with process whilst at large, becomes afterwards prisoner, the declaration must be delivered to the turnkey. Barnes, 392.

By the statute 4 & 5 W. & M. c. 21., where a defendant is in actual custody, the declaration in the suit in which he has been arrested, must be delivered, either to himself personally, or to the gaoler. The statute not having provided for the case, where the plaintiff, at whose suit he is in custody, has served him with process in a subsequent action for a different cause, the declaration in that action may be filed. 1 T. R. 191.

The original declaration, and not a copy, must be left at the prison. Barnes, 434.

If the copy of the declaration delivered varies materially from the original, that shall not be to the prejudice of the defendant but of the plaintiff; for his attorney was paid for it. C. Alf. 298.

If after imparlance the plaintiff delivers a new declaration variant and more correct than the first; that does not avail: for the judgment shall be on the first. R. Cro. El. 507.

A declaration cannot be delivered against one of two defendants, until both appear. 2 Blk. 759.

In an action of debt on simple contract against A. & B., the service of notice of declaration on A., before an appearance is entered for B., is a nullity, and A. need not notice the irregularity till judgment is signed against him. Forrest, 31.

A defendant who has surrendered on the fugitive-act, cannot be charged with declaration. Barnes, 380.

On process by husband, declaration by the bye cannot be delivered at the suit of husband and wife. Barnes, 337.

Defendant is arrested by plaintiff, as executor, who finds his action wrong, makes new affidavit for bail, and charges defendant with new declaration in his own right; proceedings shall be set aside. Barnes, 391.

### (C 2.) At what time.

A declaration cannot be delivered till the defendant appears, or is in custody. Vide ante, (B 1.)

So, a declaration shall not be received, or delivered to the attorney, before his appearance is entered with the filazer. By rule, P. 24 Car. 2. C. B. (Vide Rules and Orders of C. B. 59.)

After appearance the plaintiff ought to declare.

The plaintiff is not bound to declare before the defendant is completely in court, which, in a bailable action, is not until bail have justified. 5 T. R. 372.

The court will not (in relation to the process) inquire into the exact time of the day at which the declaration was filed. Therefore, it may be filed at an hour previous to that at which the process is served. 1 T. R. 191.

The plaintiff may declare conditionally, before the time for the defendant's appearance has expired, but not afterwards. 2 T. R. 719. 6 T. R. 548; whether the action be bailable or not. 2 N. R. 433.

In a joint action against several, after the appearance of one served with separate process, a declaration cannot be delivered conditionally against all. 2 N. R. 231.

Notice of declaration generally, is good notice of a declaration filed *de bene esse*. 8 T. R. 77.

[\*]The plaintiff cannot declare in chief until the defendant has appeared, or common bail has been filed for him by the plaintiff. 2 T. R. 719.

The original plaintiff cannot, in any case, declare by the bye, before he has declared in chief. 6 T. R. 158. ; 7 T. R. 80.

Where proceedings are by bill, and the defendant be in court, any other plaintiff may deliver a declaration against him by the bye, within the term in which the writ is returnable. 4 Burr. 2180.

Declaration by the bye cannot regularly be delivered after the term in which the writ is returnable. Barnes, 346.

The defendant is considered as in court during the whole of the term in which he has pleaded; therefore a declaration by the bye, delivered during that term, though after judgment of *billa cassata et eat sine die* on the plea (here in abatement,) is regular. 5 T. R. 634.

If the original plaintiff declare by the bye, before he has declared in chief, it is only an irregularity; which, therefore, may be waived; as, by taking the declaration out of the office. 3 East, 341.

If the defendant comes in upon *habeas corpus* the plaintiff ought to declare in two terms, otherwise the defendant shall be discharged on common bail. Mod. Ca. 21.

And if he gives bail after the return of the process, and not upon the return, he cannot by rule oblige the plaintiff to declare before. Mod. Ca. 21.

So, if a prisoner escapes and be afterwards committed on the st. 1 Ann. sess. 2. 6., the plaintiff may declare against him in two terms, otherwise the defendant shall be discharged. Mod. Ca. 22. 2 Mod. Ca. 306.

A prisoner in custody of the sheriff shall be discharged on common bail for want of declaring in due time, the same as if in custody of the marshal. 3 Burr. 1448.

The delivery of a declaration in B. R. to a prisoner in the fleet, does not prevent a *supersedeas*. Barnes, 402.

In C. B. the defendant is not supersedeable till the end of the term after that in which the process is returnable. 2 Blk. 1242.

There must be exceptions to the literal meaning of every rule, where the letter would work an injustice, or contradict the spirit of the rule: and, therefore, the court refused to discharge out of custody for want of proceeding against a prisoner within two terms, where there was a mistake occasioned by two being of the same surname. Lofft, 274.

Two defendants, one in prison, the other absconds, and proceedings to outlawry are going on, the court will grant time to declare. Barnes, 401.

A defendant who surrenders himself in discharge of his bail, shall be discharged, for want of being charged in custody within two terms. 3 Burr. 1787.

If defendant brings *habeas corpus*, and puts in bail in Trinity term, and plaintiff does not deliver declaration till Hilary following, defendant's attorney is not bound to accept it. Hutton v. Stroubridge, T. 11 G. Str. 631.

While a treaty subsists between the plaintiff and the defendant, a prisoner, the plaintiff is not obliged to declare against him within two terms. 3 Wils. 455.; 2 Blk. 918.

A plaintiff may show for cause against a *supersedeas* issuing, that the defendant has sued out a writ of error before the end of the two terms. 2 Wils. 380.

A defendant in custody is supersedeable, if final judgment is not signed within three terms, inclusive, after declaration delivered. 2 Blk. 759.

Declaration against prisoner in county gaol, may be filed any time before rule to plead. Barnes, 372.

A prisoner in execution is not supersedeable, on the ground that no judgment [\*] was docketted and entered up on the roll at the time of charging him. 2 B. & P. 163.

A surrender in discharge of bail in vacation after verdict, is considered, with reference to the rule for charging in execution, as a surrender, not of the preceding, but subsequent term; therefore, the plaintiff has until the end of the term following, the subsequent term for charging in execution. 6 T. R. 777.

The rule of K. B. Hil. 26 Geo. 3. directs, that a prisoner shall be charged in execution within two terms next after trial had, or final judgment obtained, the term of the trial or judgment to be one. The words "final judgment," mean judgment without a trial; so, that if a trial has been had, the two terms are reckoned from that of the trial, and not from that of the judgment. 4 East, 349.

Notwithstanding the allowance of a writ of error, a prisoner may be charged in execution. 1 B. & P. 292.

[\*22]



Final judgment being obtained against a prisoner in Michaelmas term, the plaintiffs being then bankrupts ; held, that the assignees could not charge him in execution in the Hilary term succeeding, being prevented by defendant's plea to their *scire facias*. 2 Wils. 378.

One of two prisoners sued jointly, who had suffered judgment by default, is not supersedeable as for a non-compliance with the rule to proceed to trial or judgment within three terms, where the plaintiff within the time proceeded to trial against the other, and thereupon assessed damages against the former. 13 East, 167.

If on a judgment in K. B. against two, one alone brings error, the writ nevertheless removes the record, so that no execution can go against the other. Hence, if he is a prisoner, he need not, for he cannot, be charged in execution until the record is remitted. 2 T. R. 737.

A plaintiff suing out a commission of bankrupt against a defendant in execution, is no ground at law for discharging him out of custody. 1 B. & P. 301.

After the lapse of a reasonable time from the death of the plaintiff, and no probate or administration granted, the defendant in execution will be discharged on notice to the plaintiff's family, and no cause shown ; 1 B. & P. 176. ; 2 N. R. 240.

The two terms limited, for declaring against a prisoner are reckoned, not from the time of arrest, but from the return of the writ. 6 T. R. 547.

Delivery in prison on Sunday is good. Barnes, 387.

Defendant is supersedeable for want of declaration, plaintiff discontinues, charges defendant still in custody with new writ on the old cause of action, he shall have *supersedeas* on common appearance. Barnes, 396.

If defendant, supersedeable, has applied for time, and after summons served, plaintiff delivers declaration, signs judgment, and charges defendant in execution, all shall be set aside. Barnes, 400.

But if a rule be given, and the plaintiff does not declare the same term, the defendant after demand of a declaration, may enter a nonsuit when the rule expires. (Vide Rules and Orders of C. B. 23.)

### (C 8.) In B. R.

In B. R. if the defendant appears in person, the plaintiff ought to declare within three days after appearance. C. Att. 318. C. Sol. 303. Han. Int. 2.

In the K. B. a plaintiff must declare within twelve months after the return of the writ ; if he do not deliver his declaration within two terms, a *non pros* may be signed ; but if it be not signed, the plaintiff has the year to declare in. 2 T. R. 112. ; 3 T. R. 123.

By the st. 8 El. 2. if the defendant was arrested, or appeared on the return of the *latitat*, *alias*, or *pluries capias* out of B. R., and put in bail according to the course of the court, the plaintiff not declaring [\*] in three days after, the judges at discretion, as they see default in the plaintiff, shall award costs to the defendant to be recovered *ut infra*.

And by the same stat. if arrested or attached on a suit in the Marshalsea, courts of London, or other city, borough, &c. in any personal action, the plaintiff shall put in a declaration in three days after bail or appearance, if the court have continuance *de die in diem* ; if not, at the next court (unless further day be given by the court) ; otherwise the court shall award costs to the defendant, to be recovered by action of debt. &c. in any court of record.

If the defendant appears, and the plaintiff does not declare, he shall be nonsuited. Bro. Default, 13.

By the st. 13 Car. 2. 2 sess. 2. if the plaintiff declares not against the defendant (arrested on process out of B. R. wherein the cause of action is not particularly expressed, and where the defendant is bailable by the st. 23 H. 6. 9.) in some personal action or in ejectment, before the end of the term next

after the defendant's appearance, a nonsuit shall be entered against the plaintiff, and the defendant shall have judgment to recover costs to be taxed and levied, as costs by the stat. 23 H. 8. 15.

So, where the cause of action is expressed, and special bail given. *Semb.* Vide *Introd.* 2.

So, in all cases. C. Sol. 69. Per Coke, 3 Bul. 214.

So, if the defendant appears upon process, and gives bail; though he never was arrested. Sal. 455.

And by rule in B. R. if the defendant be committed to the Marshalsea by any process out of B. R., and gives a rule to declare, and the plaintiff does not declare before the end of the next term after the commitment inclusive, the defendant shall be discharged on common bail. C. Att. 356.

So, if the defendant be committed to any other prison, and affidavit be made of such rule given to declare. *Ibid.*

And by the st. 4 & 5 W. & M. 21. the time allowed for delivery of a declaration to a prisoner or gaoler, &c. is only before the end of the next term after the writ or process is returnable.

The two terms limited for declaring against a prisoner are reckoned, not from the time of arrest, but from the return of the writ. 6 T. R. 547.

A copy of the declaration must be delivered to the prisoner, as well as the declaration entered, before the expiration of the term next after the process is returnable. 1 B. & P. 535.

If on a writ taken out in Easter term, returnable the last of Trinity, defendant is taken before the end of Easter term, and continues in custody of the sheriff till after the end of Trinity term, without being charged with a declaration, he shall be discharged on common bail. *Pullen v. White*, M. 4 G. 3. 3 B. M. 1448.

The rule for defendant's being discharged on common bail, extends to defendant not taken, but surrendering himself in discharge of bail; and the time runs from notice of his being in custody. *Russel v. Stewart*, 6 Geo. 3. 3 B. M. 1787.

A declaration may be delivered against a prisoner in vacation, by the same plaintiff who had arrested him. 8 T. R. 643.

If the defendant appears at the suit of A., and the stranger declares against him upon the common or special bail given to such suit (as may be in B. R.) he ought to declare within the same term in which bail was filed. C. Att. 313.

[\*] Yet A. may declare at any time before the end of the next term. C. Att. 313.

But though the time for the delivery of a declaration be expired, the defendant shall not have a nonsuit signed, if his attorney has not demanded a declaration, and given a rule; for in all actions (except replevin) the defendant shall not enter a *non pros* till the plaintiff or his clerk, if they may be found, be asked for a declaration. By rule 1654. (Vide Rules and Orders of C. B. 23.)

Common bail, filed by plaintiff's attorney, does not warrant delivering a declaration by the bye. *Wallis v. Smith*, H. 9. Geo. 2. Str. 1027. B. R. H. 207.

#### (C 4.) In C. B. Vide *ante*, (C 2, 3.)

In C. B. if the defendant appears in person, the plaintiff ought to declare.

If he appears upon the exigent by *supersedeas quia improvide*, the plaintiff, if he does not declare within six or eight days, a rule being given shall be nonsuited, and the defendant shall have his costs taxed by the prothonotary. C. Att. 29.

By the stat. 13. Car. 2. 2 sess. 2., if the plaintiff declare not against the

[\*24]

defendant (arrested on process out of C. B. where the cause of action is not particularly expressed, and the defendant is bailable by the stat. 23 H. 6. 9.) before the end of the next term after appearance, a nonsuit shall be entered as in B. R. Ante, (C. 3.)

So, in all cases, where the defendant appears at the return of the process, the plaintiff ought to declare before the end of the next term, after the term in which the process was returnable; otherwise the defendant, upon a rule given in the office of the plaintiff's attorney, shall enter a nonsuit, and shall have execution for his costs. C. Sol. 69. Compl. Att. 293.

In C. B. whether the defendant is in custody or not, and though the plaintiff may not be in a situation to declare, as, where he is proceeding to outlawry against one of two defendants, the cause is out of court, if he does not declare before the end of the second term, or obtain further time. 2 N. R. 404.

By a rule of C. B. Hil. 3 Geo. 53. the plaintiff may file his declaration on the last return of the term, or on the day after such return; and if that fall on a Sunday, then on the Monday, without entitling the defendant to an imparlance. And this rule applies equally in Easter term as to any other. 2 Mars. 337.; 7 Taunt. 70.

So, though no rule be given by the defendant, but a continuance entered by *dies datus*. Compl. Att. 293.

No rule to declare is necessary after further time has been obtained. 1 H. B. 87.

By rule H. 14 & 15 Car. 2., if the defendant be committed to the fleet in Hilary term or the vacation after, if the plaintiff does not bring him to the bar by *habeas corpus*, and declare against him within six days after the beginning of Trinity term, he shall be discharged of course by *supersedeas* out of the prothonotary's office where his commitment was entered, if he enters his appearance and brings a certificate under the hand of the warden of the fleet, that no proceeding by *habeas corpus* was against him within the time aforesaid. C. Att. 277. (Vide Rules and Orders of C. B. 43.) But now, by the stat. 4 & 5 W. & M. 21. there is no necessity for a *habeas corpus*.

[\*]So, if he was committed in Easter term, or in the vacation after, and the plaintiff does not bring him in by *habeas corpus*, and declare within six days after the beginning of Michaelmas term. C. Att. 278. (Vide Rules and Orders of C. B. 44.)

So, if he was committed in Trinity term, or in the vacation after, and the plaintiff does not bring him to the bar, and declare before the end of Michaelmas term. C. Att. 278. (Vide Rules and Orders of C. B. 44.)

So, if he was committed in Michaelmas term, or in the vacation after, and the plaintiff does not bring him to the bar, and declare within six days after the beginning of Easter term. C. Att. 278. (Vide Rules and Orders of C. B. 44.)

And the plaintiff may declare within the next term after such appearance or *supersedeas*; otherwise, the defendant's attorney may refuse the declaration. C. Att. 278. (Vide Rules and Orders of C. B. 45.)

So, if the defendant be in the custody of the sheriff, or other gaoler, and the plaintiff does not bring him by *habeas corpus* to the Fleet, he shall be discharged *ut supra* at the end of the third term after the arrest; and the plaintiff ought to declare within the next term after such appearance, and not afterwards. C. Att. 278. 2 Vent. 143. (Vide Rules and Orders of B. C. 45.)

Or, if the prisoner enters his appearance by attorney before, and gives notice of it to the plaintiff or his attorney, and makes affidavit of it in court, he shall be discharged, unless the plaintiff declares against him in the next term after such appearance, upon affidavit by the defendant's attorney that

no declaration was delivered to him. C. Att. 278, 9. (Vide Rules and Orders of C. B. 45.)

The rule of C. B. East, 5 W. & M. requiring an affidavit of the delivery of declaration to be filed within twenty days afterwards, does not extend to a declaration delivered by way of detainer. 2 B. & P. 72.

And by the st. 4 & 5 W. & M. 21., if the plaintiff delivers a declaration to the prisoner, or gaoler, &c. he ought to do it before the end of the next term after the writ or process is returnable; and after a declaration filed in the office. 2 Mod. Ca. 227.

And by a rule of the judges hereupon, if a declaration be not entered in the office, before the end of the next term after the process, upon which the defendant is arrested, was returnable, and affidavit of it be filed within ten days after Easter term, or within twenty days after any other term, the prisoner shall be discharged by *supersedeas* upon entering his appearance according to the ancient practice of the court. (Vide Rules and Orders of C. B. 116.)

But if the declaration be not delivered to the prisoner till after the third term, if he does not attempt his discharge before *ut supra*, a delivery and judgment upon it are good, and the first bail are liable to it. R. 2 Vent. 143.

So, a copy of a declaration ought not to be delivered to the prisoner, before the process upon which he was taken is returnable.

Nor shall there be any rule for a defendant in custody to plead to the declaration delivered, before affidavit, filed with the proper secondary, of the delivery of a copy of the declaration, and when, and to whom delivered. Vide post, (E. 40, &c.)

Prisoner by process of B. R. removed to the Fleet, must apply to C. B. for *supersedeas*, if plaintiff does not declare in time. Barnes, 384.

[\*]So, if the defendant be outlawed, and he reverses the outlawry and gives bail (as he ought;) if the plaintiff does not declare within two terms after the outlawry reversed, the declaration may be refused, but the plaintiff shall not be nonsuited. C. Att. 30. Because the defendant was not taken on a common writ. Ibid.

And if the defendant appears, and gives a rule to declare, and demands a declaration, the plaintiff ought to declare four days or more before the *es-soin-day* of the next term, otherwise he shall be nonsuit. Vide C. Att. 295.

Though the writ was returnable the last return of the preceding term. Semb. C. Att. 295.

But in all actions (except in *replevin*) a nonsuit for want of a declaration shall not be entered, though the rules to declare are expired, till a declaration be demanded of the attorney or clerk of the plaintiff, if their dwelling is known. R. C. Att. 294, 5.

And if an attorney delivers a declaration, without showing a deed, will, letters of administration, &c. therein mentioned, and agrees that the defendant shall not be obliged to plead till the showing of them; there shall be no nonsuit for want of a declaration, if such deed, &c. be shown before the end of the next term. C. Att. 295.

And no rule to declare shall be given after three days exclusive after the end of any term. C. Att. 294.

And such rule shall be expiring at four days, inclusive of the day in which it was given. Ibid.

[\*26]

Rule of C. B. relative to notice of declaration filed conditionally. East, 49. Geo. 3. 1 Taunt. 616.

(C 5.) How the declaration shall be entered.

When a declaration is delivered in B. R. the plaintiff's attorney ingrosses it on a roll, which is called the imparlance roll, upon which the continuances are indorsed, from the term in which the declaration was made, till issue is joined, or the action is confessed, &c., and then it is filed with the clerk of the declarations.

But it is not usually ingrossed till the defendant has pleaded.

And by the course of B. R. no continuance is entered till after demurrer, or issue joined, and then indorsed before judgment. 1 Rol. 485. l. 15.

The imparlance roll is a warrant for the plea roll, and the second declaration shall be amended by the first. R. 2 Cro. 105. Vide Amendment, (L. 2.)

Or, if there be a material variance in the second from the first declaration, it will be bad. R. 2 Cro. 415. 498. 537.

When a declaration is delivered in C. B. it ought to be entered on a roll in the prothonotary's office, and put in the docket of the same office, with the number of the roll.

And it ought to be entered in the same term, in which it is delivered. C. Sol. 68.

But if the entry of the imparlance be in the office of one prothonotary, and the nonsuit in another, it is well; for the whole is one record, and the court does not take notice of the distinction of offices. R. 2 Cro. 39.

But, in an appeal, if the defendant be arraigned at the bar, and [\*]pleads *instante*, Not guilty, there is no occasion for the declaration to be filed. R. Cro. Car. 531.

Otherwise, if the defendant pleads any other plea than Not guilty, by which there is a continuance till another term; for then the declaration ought to be filed by the course of the court. Cro. Car. 532.

(C 6.) How it shall be amended.

After the declaration is delivered, the plaintiff, in the same term and before plea, may amend as he pleases. Vide Amendment, (L. 1, 2.)

But after plea, he cannot amend it, without leave of the court. Pr. Reg. 17.

After plea, he cannot amend his bill upon the file in B. R. without leave: otherwise before plea. Pr. Reg. 18.

And, by leave of the court, so long as all remains in paper, the court may allow an amendment at discretion. 1 Sal. 47. Vide Amendment, *passim*.

But in B. R. in the next term, or after plea, the plaintiff cannot insert a new count, as *indebitatus assumpsit*, &c. C. Att. 315. Sti. Pr. Reg. 141.

Yet, after the general issue pleaded, when nothing is entered, but all remains in paper, he may amend matter of form, without costs, or giving an imparlance. C. Att. 315.

When the declaration is entitled of the wrong term, the court on application will order it to be amended accordingly. *Smith v. Muller*, B. R. E. 30 Geo. 3. 8 T. R. 624.

And matter of substance, paying costs, or giving imparlance, at his election. C. Att. 315.



So, after declaration entered, he may, by order of the court or of a judge, amend a small matter which does not deface the roll, paying costs, or giving an imparlance, at his election. C. Att. 357.

This is said to be at the election of the defendant.

If the plaintiff pays costs, the defendant shall plead, without a new rule. Sal. 517. : if the plaintiff amends the same term the defendant pleads. Sal. 520.

Otherwise, if he gives an imparlance. Sal. 517, 518.

But after a special plea, the plaintiff, if he amends in substance, shall pay costs, and has not his election to give an imparlance. C. Att. 315.

So, when the declaration is upon record, or engrossed, it shall not be amended beyond what is allowed by the statute of jeofails. 1 Sal. 47.

So, in C. B. before declaration entered, the plaintiff, by order of a judge or prothonotary, may amend, paying costs or giving an imparlance at his election. C. Att. 297. Mills, 27.

So, after declaration entered, before issue or demurrer entered. C. Att. 217. If the amendment be a small matter, which does not deface the roll, it may be amended by the court, on payment of costs, and giving liberty to plead with a new imparlance. Ibid.

In *quare impedit*, after *oyer* of original craved, plea pleaded, and variance shown between the writ and the count, the declaration may be amended on motion, and payment of costs, and declaration shall plead *de novo*. Reppington v. Tamworth School, P. 33 Geo. 2. 2 Wils. 118.

And though the declaration was delivered many years back, if nothing [\*] be on record, it may be amended, paying costs, or giving an imparlance to the defendant, at his election. Pr. Reg. 20.

*Latitat* against A. and B. ; A. only served, declaration delivered to him as against both, of that term ; *alias capias* against both ; B. served ; declaration delivered as of the same term ; the proceedings shall not be set aside for delivering declaration as against two, when only one served, but declaration amended, by entitling it of the term after both were served. Stork v. Herbert, H. 22 Geo. 2. 1 Wils. 242.

So, after the record is made up for trial. Per Holt, 1 Sal. 47. R. where the action would otherwise be lost. 3 Lev. 347. F. g. 193.

Or, after demurrer joined, if the whole be in paper. Mod. Ca. 38. [Vide 1 Ld. Raym. 669. 679.]

Held, that after demurrer argued and allowed, amendment not allowed even with costs. Butler v. Malissey, H. 4 G. Str. 76.

But again ; plaintiff may have leave to amend by the bill on the file, after special demurrer, joinder and argument. R. on debate. Bishop v. Stacy, M. 7 G. Str. 954.

On a bail-bond, if the assignment appears to be subsequent to the *memorandum*, the court will give leave to file a new bill to amend by, after a demurrer. Russel v. Martin, P. 10 G. Str. 583.

Declaration in replevin amended as to the name of the parish, after the misnomer had been pleaded in abatement, on motion, and payment of costs. Garner v. Anderson, M. 3 G. Ld. Gage v. Robinson, P. 1 G. 2. Str. 11.

So, after error brought, upon payment of costs. 3 Mod. 113.

So, an information may be amended without costs or imparlance, in a matter of form. 1 Sal. 50.

So, an information may be amended after plea, when the whole is in paper. 1 Sal. 47.

So, a plea to an indictment after a replication to it is delivered ; though the plea was filed, but not entered on record. R. 1 Sal. 47.

[\*28]

Yet the king, or the prosecutor, shall pay costs for an amendment, where a common person ought. 1 Sal. 193.

But, generally, after issue joined, and notice of trial, no amendment shall be allowed. R. 2 Mod. 144.

In a *qui tam* action, to which the general issue is pleaded, and the cause is carried down by proviso, but postponed for length, the declaration may be amended on motion, but the defendant shall have liberty to plead *de novo*. French v. Whitfield, T. 10 & 11 Geo. 2. Andr. 13.

The court will not give leave to amend declaration after the term next after the term it was delivered, and after defendant has pleaded; especially if defendant is in custody. Aubeer v. Barker, M. 20 Geo. 2. Wills. 149. Owens v. Dubois, B. R. T. 38 Geo. 3. 4 T. R. 698. cont.

And if a declaration be delivered, materially varying from the original declaration, the prejudice shall not be to the defendant, but to the plaintiff, because his attorney was paid for the copy delivered. Per Rule, 1654, Mills, 28. Vide C. Att. 298.

In ejectment, the time of the demise, (which is not yet come by a mistake of the year,) shall not be amended after verdict. R. 1 Sal. 48.

Otherwise, in a judgment on a warrant of attorney; for else the agreement of the parties would be defeated. 1 Sal. 48.

So, after a demurrer entered upon a roll, no amendment of the declaration shall be allowed. R. 1 Sal. 50.

After demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, plaintiff cannot enter a *noli prosequi* on that count, and proceed on the other. Drummond v. Durant, B. R. T. 31 Geo. 3. 3 T. R. 360.

[\*] After judgment is arrested, declaration cannot be amended, though on payment of costs. Semb. *sed qu.* Collins v. Gibbs, M. 33 Geo. 2. 2 B. M. 899.

It is the plaintiff who has the election, either to pay costs, or give an imparlance. Per cur. Ward v. Charitable Corporation. T. 8 Geo. 2. B. R. H. 126.

If defendant takes notice of the motion to amend, the amendment shall be made without either. Semb. B. R. H. 126.

If plaintiff moves to add a count, to make his declaration good from the delivery, so to prevent *supersedeas*; court will not grant it, unless he agrees to a *supersedeas* six days after the term. Barnes, 500.

On amending a declaration, defendant is entitled to a new four-day rule to plead. 2 Wils. 785.

In K. B. if the plaintiff amend his declaration the same term, the defendant has two days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*; (Str. 705.) but if the amendment be made in a subsequent term, he is entitled to a new four-day rule to plead. 3 T. R. 87. As to the rule in C. B. see 2 Bl. Rep. 785.

But note, that an amendment of the plaintiff's declaration, does not necessarily entitle the defendant to plead *de novo*; but only where the amendment alters the state of the defendant's case. 6 Taunt. 400.

When a declaration may be altered upon payment of the debt by the defendant. Vide post, (C. 10.)

When a declaration shall be amended upon the statutes of jeofails, vide Amendment (L. 1, 2.)—When a plea, vide post, (E. 39.)—Amendment, (M.)

### (C 7.) The form of a count, or declaration.

The count or declaration is an exposition of the writ, and adds time, place, and other circumstances, so that it may be tried. Co. L. 303. b. 17. a.

[\*29]

But this is to be understood of personal actions ; for, in real and mixed actions, it is not usual to count of the year, day, and place. Bro. Cont. 59.

In debt for goods sold and delivered, "an allegation that the defendant, at *Westminster in the county of Middlesex*, was indebted to the plaintiff in a certain sum for goods sold and delivered," without an allegation of an express contract, and place where such contract was made ; on special demurrer for these causes, the contract and *venire* well laid. 2 T. R. 28.

The declaration, regularly, shall be delivered of the same county where the original was sued.

But if it be in another county, it is good as to the defendant, though his bail will thereby be discharged. R. 3 Lev. 235.

The true day of filing bill shall be inserted in the declaration. Barnes, 343.

In K. B. a declaration may be entitled of the term in which it is filed or delivered. 1 East, 133.

Defendant has a right to call on plaintiff to *intitle his declaration* agreeable to the *true time* of delivering it. Thompson v. Marshal, T. 24 & 25 Geo. 2. 1 Wils. 304. Wilkes v. Earl of Hallifax, M. 5 Geo. 3. 2 Wils. 256.

A declaration entitled generally has relation to the first day of term. It may be entitled generally, though the cause of action is stated as having arisen on the first day ; since, with reference to the ancient proceedings, *ore tenus*, a declaration is not supposed to be delivered before the court have taken their seat, before which time, and on the same day, the cause might have arisen. 1 T. R. 116.

A declaration should always be entitled, because it should always be delivered, of the term in which the writ is returnable. The plaintiff, therefore, has no right to recover for a cause accrued later than that term ; and to [\*]prevent this, if the declaration is entitled later, the court will alter it. 3 T. R. 624.

If the declaration be not entitled of the term in which the writ is returnable, or of that of appearance, it is irregular ; and judgment cannot be signed for want of a plea thereto. 1 Mars. 341. 5 Taunt. 330.

Superfluous counts may be struck out, with or without costs, according to circumstances. Barnes, 335. 341. 344.

The omission of "and thereupon the said J. J. complains," in the beginning of a declaration of trespass on the case, is no cause of special demurrer. Dobson v. Herne, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 366.

A declaration may be referred for scandal and impertinence, (as, if a surgeon declares for curing defendant of the *foul disease*,) the words struck out, and exemplary costs given ; the rule for referring scandal, &c. ought to be the same at law as in equity. Per Cur. Anon. H. 28 Geo. 2. 2 Wils. 20. Cowp. 665. 727. Dougl. 194. 667.

A defendant must plead as of the term when he ought to have appeared, according to the exigency of the writ with which he has been served. 3 T. R. 627.

The court will oblige a defendant to entitle his plea as of the day on which it is filed, instead of the term generally, only where injustice would otherwise ensue, or where he has foregone the privilege of pleading it by unnecessary delay ; not, therefore, where he files a plea *puis darrein* continuance after the day in bank of a matter which has arisen between the verdict and that day, but which plea he did not file sooner, because a rule for a new trial was depending, which, had it been granted, the plea would have been unnecessary. 3 T. R. 554.

{ *Contra pacem*, &c. in count in trespass, is mere matter of form, and is not traversable. Gardner v. Thomas, 14 Johns. Rep. 134.

Where a cause of action has been barred by a discharge under an insolvent act, and the defendant afterwards promises to pay the debt, it is proper for the plaintiff to declare upon the original cause of action, without noticing the subsequent promise. Shipley v. Henderson, 14 Johns. Rep. 178.

A writing in these words, "Due A. B. 100 dollars on demand," imports an express promise to pay on demand, and may be declared on as such. Smith v. Allen, 5 Day, 337.



Where no time of payment is specified in a promissory note, the plaintiff must declare upon it according to its legal effect, as payable on demand. Bacon v. Page, 1 Com. Rep. 404. >

(C 8.) In B. R. ought to be *in custod. mar. Mar.*

The plaintiff cannot declare against one in B. R., but *in custodia marescalli*. Cro. El. 223.

Except where the defendant has privilege. 2 Sand. 415.

Or, the action is brought in Middlesex. Dy. 118. a.

*Mar. Mar. nostræ* shall be intended, marshal of B. R. Sal. 602.

And now, by the statute 4 & 5 W. & M. 21. if a defendant taken on a process out of B. R. be detained for want of surety for appearance the plaintiff may deliver a declaration to the prisoner or the gaoler in whose custody he is, and in the declaration allege, in the custody of what sheriff, bailiff, &c. the prisoner is at the time of the declaration delivered, which shall be as effectual as if alleged in the custody of the marshal of the Marshalsea.

If he be in actual custody of the marshal of the Marshalsea, it is sufficient in term to file a bill against them, and deliver a declaration to the turnkey. 2 Sal. 213.

In vacation it ought also to be entered in the book of the marshal's office, *quod remaneat in custod. ad sect. A. B.* Ibid.

And therefore, before the plaintiff can declare, there ought to be a *committitur* of the party, or bail put in by him in B. R. 1 Rol. 581. l. 10. Poph. 145.

And before the st. 4 & 5 W. & M. 21., if he was arrested in the country, and there detained, he must be removed by *habeas corpus* to B. R. before the plaintiff could declare.

And though the bill relates to the first day of the term, the action shall not be said to be depending till bail is filed. R. 1 Vent. 135. 264.

But if a man was committed to the marshal of the Marshalsea for a [\*]contempt, the plaintiff cannot declare against him there without leave of the court. R. Ray. 58.

So, if he was committed for any other misdemeanor. R. 1 Sid. 154.

So, if a man attainted be pardoned, he shall not be charged with an action *in custod. marescalli*. R. Sal. 500.

Yet if the plaintiff declares against a man *in custodia marescalli*, when committed for a misdemeanor; *quod fieri non debuit, factum valet*. Ray. 58. 1 Sid. 90.

So, if the plaintiff declares against him there, and he is afterwards removed to the Fleet, the plaintiff may proceed in B. R., and after judgment, remand him by *habeas corpus* to the marshal. D. 1 Sid. 100.

If the defendant be in B. R., *in custod. mar.*, at the suit of any one, the same plaintiff may declare against him in another action, in the same or a subsequent term.

So a stranger may declare against him in the same term. R. Poph. 145, 6. Adm. 1 Sal. 2.

But, in an appeal, if the sheriff returns *cepi corpus*, the plaintiff cannot declare against him in B. R., but upon the original, on which the *cepi corpus* was returned; for there is no reason to commit the defendant to prison, when he is ready to answer the writ on which he was taken. R. 1 Rol. 531. l. 15.

So, a man not in actual custody, but upon bail, is not liable to all other actions. 1 Sal. 1.

So, if he is not in actual custody, he may plead the privilege of C. B., though he be arrested by process of B. R., and is thereby supposed to be in *custodia marescalli*. R. 1 Sal. 1.

A declaration against a defendant as a prisoner, must mention at whose suit.

But if it is in debt, and says the *latitat* was *de placito quod reddat* to the plaintiff, it is sufficient ; for it must be understood it was his suit. *Morris v. Watkins*, P. 10 Geo. 2. Ld. Raym. 1362.

And if it does not mention at whose suit, defendant may demur generally. *Williams v. Wills*, H. 19 Geo. 2. *Wilson*, 119.

### (C 9.) Addition not necessary, nor recital of a plaint.

In B. R. the defendant's addition is not necessary, for the declaration is not founded on an original, and therefore is not within the st. 1 H. 5. 5.

So, a recital of the plaint is not necessary.

Nor, a recital of the original at large, where the suit is thereby original. R. Carth. 108.

But in account and debt the usual form is to say, *A. queritur de B. in cust. mar. &c. de placito quod reddat ei 10 lb. &c. pro eo videlicet quod cum, &c.*

In covenant *de placito conven. fract.* 2 Sand. 361.

In case and ejectment. *A. queritur de B. in cust. mar. &c. pro eo videlicet quod cum, &c.*

Yet the bill or plaint ought to be filed. 2 Cro. 186.

And if the bill be filed before cause of action, it is error. Vide Action (E).

So, if there be a material variance between the bill and declaration. R. Latch, 58. 2 Cro. 294. Vide Variance between Original and Declaration, post. (C 13, 14, 15.)

When it may be amended. Vide Amendment, (D 7, 8.)

[\*]So, a new bill may be filed by leave of the court, where the old one may have been lost. R. 2 Cro. 186.

So, a declaration upon a bond, indenture, or other deed, does not conclude with a *profert in cur. &c.* but after mention of the deed is added *curiaque dict. domini regis nunc hic ostens.*

If the plaintiff declares by such a one, his attorney omitting his christian name, it is error. R. 1 Rol. 336. Vid Attorney, (B 7.)

Payment of money into court is an admission of only a legal demand. *Ribbans v. Crickett*. C. P. E. 38 Geo. 3. 1 Bos. & Pull. 264.

### (C 10.) When money may be brought into court.

If the declaration be for a large sum of money, where only a small sum is due, on motion of the defendant, and payment into court of the sum due and costs to the time of the motion, the plaintiff shall proceed for the residue at his peril.

The first motion to bring money into court was in Kelynge's time, and introduced to avoid the hazard and difficulty of pleading a tender. Str. 787.

And in B. R. if the defendant produces the rule at the trial, and the jury do not give damages above the sum paid into court, the plaintiff will be nonsuited, and must pay costs to the defendant.

So in C. B.

[\*32]

After refusal, or issue joined, plaintiff may have it and costs, to the time of paying in, he paying defendant subsequent costs. Barnes, 280. 282. 284. 287. 357.

In the K. B. if the defendant pays money into court, the plaintiff is entitled to costs up to that time, though he afterwards proceeds with the action. 1 T. R. 629.

If the defendant pays money into court, which the plaintiff refuses to accept, and at the trial a juror is withdrawn, the plaintiff cannot claim costs up to the time of paying money into court. 3 T. R. 657.

The plaintiff is entitled to costs up to the time of payment of money into court, though he proceed to trial and fail, provided he apply before trial, and serve the defendant with notice of an appointment before the master to tax the costs (which he, not the defendant, must do); after trial he comes too late. 4 T. R. 10.; 1 T. R. 710. Id. 10.

In all cases where the plaintiff does not proceed to trial, he is entitled to costs up to the time of paying money into court; even though defendant may have judgment as in case of a nonsuit. 8 T. R. 408.

Where money is paid into court, and there is no trial, the plaintiff is entitled to costs up to that time, though he withdrew the record twice after carrying it down, and then discontinues. 8 T. R. 486.

Where the defendant having failed from having paid money into court generally, obtains a new trial, and leave to amend the rule for paying, &c. by confining it to particular counts, whereupon the plaintiff elects to accept the money, and not proceed further, he is entitled to the costs of the whole action. 9 East, 325.

Touching the question of costs, judgment is in case of a nonsuit of the same force as a judgment upon nonsuit; as, therefore, in the latter case the plaintiff is not entitled to costs up to the time of the payment by the defendant of money into court, neither is he in the former. 2 M. & S. 335.

In C. B., if the defendant pay money into court, the plaintiff will not be entitled to costs up to that time at all events, although he should afterwards proceed to trial, and a verdict should be found for the defendant. 2 B. & P. 56.

In C. B. a plaintiff is entitled to costs up to the time of paying in money, notwithstanding he proceeds to trial and fails. 3 B. & P. 556.

The general rule as to costs, where money paid in is not accepted, and the defendant has a verdict, is the same in C. B. as in K. B., namely, that [\*]the plaintiff is not entitled to costs up to the time of payment in. 2 Taunt. 361.

A defendant succeeding after payment of money into court which the plaintiff refuses to accept, is entitled to the costs of the whole action. 4 Taunt. 196.

Where the defendant pays money into court, and the plaintiff proceeds, and suffers the defendant to sign judgment of *non pros* against him, he shall not afterwards be entitled to his costs up to the time of paying the money into court. 1 Mars, 510.; 6 Taunt. 158.

Where money is paid into court upon some counts only which the plaintiff takes out, he is only entitled to the costs of those counts. 4 T. R. 579.

Where the plaintiff accepts money paid into court on one count only, and discontinues, he is not entitled to the costs of the others. 2 Taunt. 266.

Where several insurance causes on the same policy, in each of which the defendants have paid money into court, which the plaintiff has taken out without taxing costs, are consolidated to abide the event of one; if the plaintiff is nonsuited in that one, he is not entitled to costs in the others, up to the time of paying money into court, any more than in the one tried. 7 T. R. 372.

Where actions on policies are consolidated, and money is paid into court, which the plaintiff not accepting, the defendant has a verdict, the plaintiff is nevertheless entitled to the costs of the short causes up to the time of payment in. 2 Taunt. 361.

A plaintiff on a policy, taking the premium out of court, does not lose his costs of the special counts, where there is no consolidation rule, though he had failed on the special counts in another action. 5 Taunt. 607.

If defendant refuses to pay costs, attachment shall go. Barnes, 283.

And the plaintiff shall have the money brought into court; though he be nonsuit. Sal. 597.

A pauper plaintiff shall have the money out of court, though the verdict is for defendant; if not a pauper, defendant would have it towards his costs. Lee v. Holland, T. 1730. Bunb. 287.

If plaintiff recovers a less sum, defendant shall have the money towards his costs. Barnes, 280.

Money brought into court on pleading a tender, cannot be taken out by defendant towards his costs, though he has a verdict. Cox v. Robinson, H. 9 G. 2. Str. 1027. B. R. H. 206.

If defendant does not pay the costs taxed, though plaintiff recovers less than the money paid into court, yet he shall have his costs. Hand v. Dinely, H. 18 G. 2. Str. 1220.

It shall not be paid back to executors on defendant's death. Barnes, 279.

Though plaintiff dies before trial, defendant cannot have back the money. Barnes, 281.

Plaintiff shall have the money, though judgment is arrested. Barnes, 284.

Money paid into court by mistake, cannot be recovered back. Secus, if paid by fraud. 2 B. & P. 392.

Where a defendant deposited money, under a rule of court, to abide the event of an action of tort, and died before trial, the plaintiff was not permitted to take it out. 5 Taunt. 603.

If plaintiff replies after money paid in, he cannot afterwards take it out and enter acquittal, without leave of the court and payment of defendant's costs. Barnes, 357.

Where money is paid into court upon the common rule, the court will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented making a legal tender by the fraud or vexatious conduct of the plaintiff. Therefore they refused the application where the defendant had merely pulled out his pocket book, for the purpose of [\*]making a tender, six weeks before action brought, and was prevented by the plaintiff walking away; never repeated the offer. 2 Mars. 478.

Where money is paid into court generally, it can only be applied to such demands as are legal. 1 B. & P. 265.

Where money may be paid into court upon some counts of the declaration, upon others not, a payment generally must be applied to the former only. 1 Mars. 581.: 6 Taunt. 322.

On a declaration stating multifarious demands arising out of one transaction, payment into court of a sum incompetent to meet all the demands, cannot be applied by the plaintiff as evidence of such one of the demands as he may elect. 7 Taunt. 450.; 1 Moore, 158.

If money is regularly paid into court under a rule, as in an action for unliquidated damages, the plaintiff's course is to move to discharge the rule; for if he takes the money out, he waives the irregularity, so that, to entitle himself to a verdict, the jury must give damages beyond the sum paid in. 1 T. R. 710.

The payment of money into court admits, 1st, the plaintiff's right to maintain the action; 2dly, and to recover up to the extent of the sum paid in, and no more. If, therefore, consistently with the defendant's contract, he may have concluded it, and yet owe thereon no more than the sum paid in, the onus of proving, in the regular way, that more is due, lies upon the plaintiff. 1 T. R. 464.

The payment of money into court is an admission of the contract stated in the court. 2 T. R. 275.

Payment of money into court generally admits the contract as stated in the declaration. 9 East, 325.

Payment of money into court generally, admits the existence of a contract in every transaction which may be turned to one by assent of parties. 2 B. & P. 550.

The payment of money into court by a defendant sued on a contract, is an act whence a jury may infer that he made the contract, such being the natural inference,

The fact that he made it being established, if it necessarily follows that having made it, he must owe more than the sum paid in, they are warranted in finding that also, unless he shows payment. But, unless that is the inevitable consequence ; if it does not follow, that because he made the contract, he therefore owes the money ; if a state of things may exist in which he would be liable for the sum paid in, and no more, he is not, by the act of paying in the money, made liable farther. Hence, where an action was brought on a policy on goods to be loaded at a particular port, and the defendant paid money in generally ; held, that he might contend that the goods except as to such portion as the money paid in covered, were not loaded at the specified port, and so that the policy never attached. 2 M. & S. 106.

Payment of money into court in a suit demanding payment, does not discharge the debt ; therefore, it may still be pleaded by way of set-off. 3 T. R. 186.

Payment of money into court upon a contract, is only evidence from which a jury may infer the fact that the party made the contract ; therefore, if they only state the fact of the payment in a special verdict, the court cannot draw the inference. 2 M. & S. 106.

In an action on a bill of exchange against the drawer, payment of money into court, generally, is an admission of his hand-writing. 2 H. B. 374.

Payment of money into court on a valued policy, only admits a loss *pro tanto*. 1 Taunt. 419.

In *assumpsit* by the owner of a trunk of the value of 15*l.* which had been lost by the defendant, a carrier, the declaration stated a general undertaking by the defendant to carry goods safely for hire, and the defendant paid [\*]5*l.* into court. Held, that the defendant could not give in evidence a notice, "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked and paid for according to the value," and that the trunk in question had not been so paid for ; because the payment of money into court, upon a count stating a special contract, and narrowed the inquiry to the *quantum* of damages sustained by the breach thereof. 2 East, 214.

If the plaintiff, previous to the trial, has induced the defendant to believe that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose ; the court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by the payment of money into court. 3 B. & P. 556.

And this is allowed in all personal actions, where the debt demanded is certain ; as in debt. 1 Vent. 356. Sal. 597.

In *indebitatus assumpsit*. 1 Vent. 356.

So, in *indebitatus assumpsit* and *quantum meruit* ; though the *quantum meruit* is uncertain. Dub. per Holt, but afterwards agreed. Sal. 597.

So, in covenant for nonpayment of rent. R. Sal. 596. Per C. B. 3 Geo.

So, in covenant to find diet, or pay 10*l.* 2 Mod. Ca. 305.

In replevin where the defendant avows for rent. Sal. 597. 2 Mod. Ca. 379.

In ejectment where the entry was for nor nonpayment of rent. Sal. 597. Per C. B. 3 Geo.

And now by the st. 4 Geo. 2. 28. if the tenant at any time before trial in ejectment pay to the lessor or his attorney, or into court, all the rent due and costs, all proceedings in the ejectment shall cease.

So, after judgment, execution shall be stayed. 2 Mod. Ca. 345.

Where a sum of money demanded is certain, or capable of being ascertained by computation, payment into court will be admitted, and the amount struck out of the declaration. 2 Burr. 1120.

In trover for money, he shall bring the whole money declared for into court. Anon. H. 5. G. Str. 142.

It may be brought into court in an action at the suit of an executor, and he shall [\*35]



lose costs, but not pay them. *Crutchfield v. Scott*, P. 1 G. 2. Str. 796. Barnes, 282.

If plaintiff is an administrator, and not so named, rule shall be discharged. Barnes, 280.

In debt for killing a hare, defendant may bring penalty and costs into court, (if no other count). *Webb v. Punter*, M. 18 G. 2. Str. 1217.

So, in covenant, where the breach assigned is a sum certain. Barnes, 284.

In trover for a specific chattel of certain value, which must be the sole measure of damages, the thing demanded may be brought into court, or ordered to be delivered to plaintiff. *Fisher v. Prince*, M. 3 G. 3. 3 B. M. 1363.

But where quantity or quality is uncertain, or *tort* may enhance damages above real value, and no rule to estimate additional value, it shall not. 3 B. M. 1363.

And though court orders the goods to be delivered to plaintiff, he may still proceed for damages at peril of costs. 3 B. M. 1363.

It is not of course, if plaintiff is an executor. Barnes, 279.

In replevin, after declaration and before avowry, proceedings may be staid, on payment of rent distrained for and costs. Barnes, 429.

Where a third person claims from the defendant the whole of the plaintiff's [\*]demand, the court will stay proceedings on paying it into court. *Secus*, where the claim is part only. 1 B. & P. 161.

Where the defendant has received the sum in question by virtue of his public office, for example, as a navy prize agent, and there are other claimants besides the plaintiff, it may be paid into court for the use of those who shall appear entitled. 1 Taunt. 166.

A foreigner having obtained judgment in *assumpsit*, and the defendant therein having a cross-action upon the case pending against the foreigner, for damages accruing out of the same transaction, the court permitted the defendant to pay the debt on the former judgment into court, to abide the event of the suit then pending, but to be paid out immediately after the trial, he going to trial immediately. 1 Smith, 338.

The stat. 19 Geo. 2. c. 37. s. 7. which enables a defendant to pay money into court in actions on policies of insurance, (and therefore to make a tender before action,) is general, and not confined to marine insurance. 2 Taunt. 317.

Money was paid into court in an action upon the case for canal calls. 7 T. R. 36.

Principal and interest due on a bond payable by instalments, may be paid into court. 3 Burr. 1870.

Penalty of a bastardy bond paid into court. 2 Blk. 1190.

Money was allowed to be paid into court in debt for penalties on the game laws. 2 Blk. 1052.

In general, in covenant, money cannot be paid into court, since the action is usually for uncertain damages; but on a special count for a liquidated sum, such as for nonpayment of rent, or of 5*l.* per acre for ploughing up meadow-land, it may. 2 Blk. 837.

On an avowry for rent, the plaintiff may pay it into court. 1 H. B. 24.

But where the action is only for damages, defendant shall not be allowed to pay any sum into court upon motion; as in covenant. R. 1 Vent. 356. If it be for not repairing. Sal. 596.

In trover for goods certain, he shall not be allowed to bring the goods into court. Sal. 597.

In replevin where he avows for damage feasant. 2 Mod. Ca. 379.

In an action for general damages, since a tender cannot be pleaded, the defendant cannot pay money into court: and therefore in an action for dilapidations. 8 T. R. 47.

In debt for a fine in a manor-court, money cannot be brought into court. *Gold v. Freame*, H. 1722. Bunb. 124.  
[\*36]

In an action for immoderately driving a hired chaise, money shall not be brought into court. *White v. Woodhouse*, M. 1 G. 2. Str. 787.

A laced head, for which trover is brought, cannot be brought into court. *Bowington v. Parry*, H. 2 G. 2. Str. 822.

But the court may make rule to show why the goods and costs should not be accepted. *Barnes*, 281.

But the court will not do this, if the goods have been altered. *Barnes*, 284.

Money cannot be brought into court in debt *sur emissit*, for goods sold. *Leapidge v. Pongillione*, H. 4 G. 2. Str. 890.

It cannot be brought on a bond from bailiff for his good behaviour, and payment of money to the sheriff's use. *Barnes*, 285.

Nor in debt on bond for performance of covenants in a lease. *Barnes*, 286.

Nor for the penalty of a charter-party. *Barnes*, 285.

Nor in an action for dilapidations. *Squire v. Archer*, T. 5 G. 2. Str. 906.

Money cannot be brought into court in debt for rent; but the court will [\*]refer it to the master to compute what is due, on defendant's undertaking to pay. *Lee v. Irish*, M. 9 G. 2. B. R. H. 173.

It may on debt for rent, and *nil debet* pleaded; so, in covenant for nonpayment of rent. *Barnes*, 280.

But not on covenant, if defendant is to render best beast for heriot, or money, at plaintiff's election. *Barnes*, 289.

It cannot on debt on bill penal, with count added on a *mutuatus*, but after verdict the court will not set it aside. *Barnes*, 283.

In trover, pictures cannot be brought into court. *Olivant v. Perineau*, T. 16 G. 2. Str. 1191. *Wils.* 23.

In an action on contract to pay in foreign money, the court will not allow money to be paid into court, since without the intervention of a jury the value cannot be fixed. 5 T. R. 87.

Money cannot be paid into court by a carrier sued in *assumpsit* for goods spoiled. 2 B. & P. 234.

Money cannot be paid into court in *assumpsit* for the non-delivery of goods at a certain price. 3 B. & P. 14.

The defendant in an action for a false return to a *sci. fa.* cannot pay money into court. 7 T. R. 335.

Where one defendant suffers judgment by default, and a second is outlawed, the third shall not bring money into court. 3 Blk. 1029.

Yet, by the st. 4 & 5 Ann. 16. in an action on a bond with a penalty, if the defendant brings into the court, where the action depends, all the principal and interest due, and all costs expended in any suit in law or equity upon such bond, the money brought in shall be taken in full satisfaction of such bond; and the court may give judgment to discharge the defendant of and from the same.

So, before this statute, if the penalty of the bond was brought into court by rule, it was referred to the master or prothonotary to tax the principal, interest, and costs for the plaintiff, and the residue was returned to the defendant. *Mod. Ca.* 101. *Sal.* 597.

On bond with penalty, conditioned to pay money by instalments, and action brought on failure of one payment, proceedings shall not be stayed on paying the sum then due, and costs. *Land v. Harris*, P. 8 G. Str. 515. *Contra*, *Bridges v. Williamson*, M. 2 Geo. 2. Str. 814. *Mayne v. Somner*, H. 4 Geo. 2. *Ibid.*

In debt on bond to pay money by instalments; on failure of the first payment, plaintiff shall have judgment; but shall not take out execution, but as the payments become due. *Darby v. Wilkins*, M. 7 Geo. 2. Str. 957.

Paying all the past instalments, with interest and costs, is sufficient; and if more money is brought into court, it may be ordered out of court to the party who brought it in. *Lucas v. London*, M. 11 Geo. 2. Str. 958.



On bond to pay a gross sum at a day certain, defeazansed afterwards by articles, to pay by instalments at days therein mentioned, provided he pays punctually, and lives till all the days are past, otherwise defeazance to be void; obligor makes default, the gross sum must be paid; and on action against him, he cannot pay in the money due on instalments only, even though obligee, after the default, received interest on all remaining due. *Bonafous v. Rybot*, P. 3 Geo. 3. 3 B. M. 1370.

On bond to secure annuity. *Barnes*, 288.

Plaintiff brought debt on bond against defendant administrator, filed a bill for discovery of assets, and instituted a suit for an inventory; judgment for plaintiff reversed on error; new action brought; and defendant moves to stay proceedings on 4 & 5 Ann. on payment of principal, interest, and costs; and the court directed costs only of that second suit, though the words [\*] of the act are, "all costs in any suit in law or equity on such bond." *Sisney v. Nevinston*, P. 12 Geo. Str. 699.

And the court will not oblige to the payment of another debt in conscience, before relief. *Mod. Ca.* 101.

So, in covenant, if the breach is assigned for nonpayment of rent or a sum certain. *Per King Ch. J.* Hil. 3 Geo.

So, in ejectment upon a condition broken for nonpayment of rent. *Per King Ch. J.* Hil. 3 Geo. (*Vide* 2 Str. 900.)

But a proffer after notice of trial shall not be allowed, if the payment be not so ready as not to delay the trial. *Mod. Ca.* 25.

It may be paid in at any time before plea pleaded. *Barnes*, 279. 281.

The court will not allow money to be paid in after plea pleaded. *Thornton v. Gibson*, H. 20 Geo. 2. 1 Wils. 157. *Barnes*, 286. 349.

Nor after judgment for want of plea. *Barnes*, 281. 285.

Before plea pleaded, the payment of money into court is of course. After plea, it may be done by a judge's order. 1 T. R. 710.

After issue joined, it cannot be increased. *Barnes*, 282. 286.

After general issue pleaded, the court will give leave to withdraw it, in order to bring money into court, and replead it. *Tarlton v. Wragg*, T. 21 Geo. 2. Str. 1271.

It cannot in an action of trespass for the mesne profits, against tenant in possession, after judgment in ejectment against the casual ejector, for this action is for a tortuous occupation. *Holdfast v. Morris*, H. 33 Geo. 2. 2 Wils. 115.

If the money is not paid into court when defendant has pleaded tender with a proffer in cur. it is no plea, and plaintiff may sign judgment. *Pether v. Shelton*, M. 12 Geo. Str. 638.

Where an inquisition is set aside, and a fresh enquiry directed; money, with costs up to that time, may be paid into court, and struck out of the declaration, upon the usual terms. 1 Taunt. 491.

So, it shall not be allowed in debt on a judgment. *Mod. Ca.* 60.

If plaintiff, in a bill in equity, offers to pay money (an insurance premium) to defendant, and an issue is directed wherein he is defendant; this offer is the same as if the money had been actually brought into court. *Wilson v. Duckett*, M. 3 Geo. 3. 3 B. M. 1361.

If defendant moves to stay proceedings in debt on bond, on payment of principal, interest, and costs, and there is a suit in equity for the same matter, he shall pay the costs there also. *Lock v. Sherman*, P. 8 Geo. 2. B. R. H. 116.

A. is indebted to B. 2l. 5s. for rent, and is always ready to pay; B. keeps out of the way, and brings action; A. summons him before a judge to show cause why, on payment of debt and costs, proceedings should not be stayed; B. pretends other demands, which obliges A. to obtain the common rule to pay the money into court with costs; B. applies to take the money, and have the costs taxed: this is oppressive, and the court will discharge the rule as to costs. *Johnson v. Houlditch*, P. 31 Geo. 2. 1 B. M. 578.

The court will give leave to pay money as to some counts, and to the rest to

[\*38]

plead general issue, statute of limitations, and set off bankruptcy, but not to demur. Barnes, 286. 350.

And to plead general issue, and *plene administravit*. Barnes, 287.

Or, to withdraw plea, pay in money, and plead general issue on terms. Barnes, 362.

Or, to withdraw, pay money, and plead the same plea. Barnes, 289.

[\*](C 11.) In C. B. must be upon an original, &c.

But all declarations in C. B. are founded on an original writ, original bill, or upon an attachment of privilege. Lut. 228.

And therefore, if the declaration there begins with a *queritur*, as in B. R., it is error. R. Lut. 228.

The ancient course in C. B. was, that the plaintiff declared upon the appearance, and after imparlance made a declaration *de novo*. 2 Cro. 89.

But the first declaration was the foundation and warrant for the second. Ibid.

And if there was no original, it was error at the common law.

So, if there was no writ of privilege filed, where the suit is by attachment of privilege. R. 2 Cro. 418.

So, if the plaintiff declared twice on the same original, and one declaration varied from the other. R. Cro. El. 416.

But the want of an original is aided after verdict by the st. 18 El. 14. Vide Amendment, (D. 6.)

And now, by the st. 4 & 5 Ann. 16. after judgment by confession, *nil dicit*, *non sum inform.*, or after a writ of inquiry executed, all defects are aided, as after verdict, so as there be a writ, original, or bill duly filed.

An original writ of the term in which final judgment is given, will not warrant that judgment, if it appear on the same record that there have been proceedings of a preceding term. Dyke v. Sweeting, H. 21 Geo. 2. 1 Wils. 181.

The memorandum need not set out in what plea, for the original being recited *verbatim*, shows itself. Barnes, 331. 333. 336.

If the original is returnable the second return of the term, though the *placita* are entered generally of the same term, it is well enough; for the whole term may be considered as one day; and in C. B. there are no special *placita*. Philipps v. Philipps, T. 11 & 12 Geo. 2. Andr. 248.

But in B. R. where a debt accrues in term time, and in the same term the party comes and complains, he must have a special memorandum to show that the cause of action precedes the bringing it. Ibid.

And after verdict, any default of this nature would be cured by st. 5 Geo. 3. c. 13. in which penal actions are not excepted. Ibid.

(C 12.) How the original shall be recited.

And when the suit is upon an original, the original shall be recited in the declaration shortly.

As in account, annuity, covenant, debt, detinue, and replevin, (in which actions the original is a summons,) the declaration shall be *A. &c. sum, fuit ad respondendum q. de placito, &c.*

And in actions upon the case, ejectment, trespass, &c. (where the original is an attachment,) the declaration shall be *A. &c. attach. fuit ad respondendum q. de placito.*

And in actions upon the case, &c. where the writ contains the case at large the writ anciently was recited at large in the declaration. [Vide 2 Wils. 394.]

But now, by rule of court, the declaration ought not to recite all the original, but it is sufficient to mention the nature of the action as *A. attach. fuit ad respondendum q. de placito transgressionis super casum*. C. Att. 296.

[\*]So in personal actions on a general statute, except in debt. C. Att. 296. Per rule 1654, Mills, 26.

So in actions upon the case, or a general statute by original in B. R. C. Att. 357.

The original recited is part of the declaration, and therefore in trespass; if the writ be recited to be *vi et armis*, it is sufficient, though that be afterwards omitted. R. Lut. 1509. Vide post, (3 M 7.—C 86.)

If the writ for taking of goods says *pretii* or *ad valentiam*, &c., it is sufficient, though it be omitted in the declaration. R. 1 Sid. 150.; 2 Cro. 654.

If the writ says *bona et catalla sua*, and the declaration omits *sua*. R. 1 Sid. 187. R. Lutt. 1509.

But a vicious recital of an original does not hurt the declaration, if the writ itself, upon oyer, be not bad; as, in replevin *de capt. averiarum* for *averiorum*. R. Sal. 701.

### (C 13.) Must be conformable to the original.

And the declaration ought to be conformable to the writ. Co. Lit. 303. a.

And for variance between the count and the writ, the defendant may plead in abatement. Vide abatement, (G. 8.) And see there for what variance a plea in abatement is good.

So, a material variance between the count and the writ, is error: as, if the count demands more, or less, than the writ, as where the writ is *quare clausum fregit*, the count *quare clausa*. R. Cro. El. 185. Vide post, (3 M. 6.)

When the whole original writ was spread out on the roll, together with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage of it, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. 2 Wils. 394.

But afterwards, it was determined, that if the defendant would take advantage of a variance between the writ and count, he must demand oyer of the writ, and plead the variance. 2 Wils. 85. 395.

Which now he cannot do. Vide in Abatement.

And the court frequently permits the defendant to take advantage of a variance on motion. Turing v. Jones, B. R. M. 34 Geo. 3. 5 T. R. 402.

Even where the proceedings are by bill, a variance between the writ and declaration in the nature of the action, or right in which the plaintiff is suing, is a ground for setting the proceedings aside. 5 T. R. 402.

But the court will not, on motion, permit a defendant to take advantage of a variance between the sum mentioned in the *ac etiam* part of the *latitat* and the declaration. Ibid.

The court will not set aside the proceedings for irregularity for a variance between the original writ and the declaration. Spalding v. Mure, B. R. T. 35 Geo. 3. 6 T. R. 363.

The defendant must take advantage of an irregularity in the writ before appearance. Fox v. Money, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 250.

So, if the writ be *quare clausum fregit et herbam ibidem conculcavit*, and the count omits *fregit*; for then the count omits the trespass for the entry into the close, which was in the writ. R. per two J. Ventris cont. be-

[\*40]

cause the treading down the grass in the close imports an entry into it. 2 Vent. 153.

[\*]So, a writ in replevin *de avariis*, &c. a count *de equo*. R. Cro. El. 330. 7 Ed. 4. 31. b. R. Lut. 1181.

In trespass, where the writ was *quare bona et catalla cessit*, a count of a cow was held bad. Ld. Raym. 4.

So, in forger of false deeds, a writ of divers false deeds, and a count of a deed of feoffment. 35 H. 6. 37.

If a writ in trespass be *contra pacem nuper regis*, and the declaration *contra pacem regis nunc*. 11 H. 4. 15. 2 Ed. 4. 24. b.

So, a writ for goods *ad valentiam* 20*l.*, declaration *ad valentiam* 40*l.* R. Cro. El. 308.

So, in an action on the case for a nuisance, if the writ be for raising a yard, and the declaration adds, digging a gutter. R. Cro. El. 829.

So, in debt. if the writ be in *placito debiti* 10*l.*, and the plaintiff declares for 20*l.* R. Cro. El. 434.

So, if a writ of waste be against the defendant *ex dismissione* A., and the count shows a feoffment to B., who ought by recovery to declare the use to the defendant, it is bad; for it ought to have been (as appears by the declaration) *ex dismissione* B. R. Cro. El. 722.

If the writ be on the demise of the predecessor, and the count on the demise of himself, or *e contra*. R. 1 Rol. 432.

The plaintiff may declare *qui tam* on general process. 3 Wils. 141. 2 Blk. 722. But it is irregular to declare in one's own right on process *qui tam*. 4 Burr. 2417.

A declaration must agree with the process in the number of plaintiffs. 1 B. & P. 383.

And the rule, that on joint bailable process, the declaration must be joint against all, is without an exception. 1 M. & S. 55. 1 B. & P. 19. Id. 49.; though the writ and affidavit describes the cause of action to be several as well as joint. 4 East, 589. Smith, 285.; and the declaration will be set aside if not against all, though it has been taken out of the office by those against whom it was filed. 2 N. R. 82.; and not merely an *exoneretur* entered as to the bail. 5 T. R. 722. But in process not bailable, the plaintiff may declare separately against each defendant. Ibid. & 2 T. R. 257.; and the insertion in the process of the name of one not named in the affidavit of debt, does not make the declaration against the other defendant alone irregular. 2 N. R. 98. But where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings. 1 Mars. 274. In bailable process, however, against two, with *ac etiam* against the latter solely, though the sheriff may arrest both. 7 Taunt. 458. 1 Moore, 147.

The omission of the words in a declaration, by original, and thereupon the plaintiff complains, is so far informal, that, although the defendant cannot therefore demur, the court will compel their insertion. 1 B. & P. 366.

The extent and meaning of a special plea is to be collected from the introduction. 6 T. R. 565.

If the general issue and special plea be pleaded, and the latter commencing as an answer to part only of the demand, answers the whole; it is bad on special demurrer. 2 B. & P. 427.

< When the defendant is held to bail on a *capias*, by an *ac etiam* clause, the plaintiff is bound to pursue it, and declare accordingly. Rogers v. Rogers, 4 Johns. Rep. 485.

And in such case, if the plaintiff vary the cause of action, it is an irregularity which the defendant may avail himself of on motion. Ibid. >

## (C 14.) When a variance shall be aided.

And a material variance is not aided by verdict. R. Cro. El. 185. 829. 330. 722. R. 2 Vent. 153. Per Powell acc., but Treby cont. Lut. 1181. { Vide Griffin v. Pratt, 3 Conn. Rep. 513. Dillman v. Shultz, 5 Serg. & Rawle, 35. } Vide Amendment, (D 18.)

But misprision of one original for another, as summoned for attached, [\*] is only form, and aided by verdict. Semb. 2 Cro. 108. Cro. Car. 91. 4 Mod. 246.

In an action on the case, if the writ is recited *summonit* instead of *attach*. it is well. Brown v. Morgan, M. 4 Geo. 2. Fort. 341.

So, on debate, in the case of a member of parliament. Lockyer v. Chetwynd, in C. B. Fort. 341.

So, if the original be certified in one county, where the action was in another, it shall not be intended the original in the same cause, but rather that there was no original, and this is aided by the statute. R. 2 Cro. 655. 674. Vide Amendment, (D 8.)

Or, of another term, or between other parties. R. Cro. Car. 327. R. 3 Mod. 136.

Special original in L. plaintiff declares, in M.; defendant takes the declaration out of the office; plaintiff sues out new original in M.: proceedings shall not be set aside. Barnes, 415.

So, if the original recited in trespass be only for one day, the declaration for trespass on several days. R. 4 Mod. 246.

If the original certified was such as the defendant was outlawed upon; for then the plaintiff may declare upon that or upon a new original. R. Jon. 442, 3.

So, if upon no original being assigned for error, diminution be alleged whereupon the *custos brevium* certifies an original of the term in which the *placita* is entered, which is a variance: it may be suggested, that there is another original in the same, or a precedent term, and there shall be another *certiorari* for it. R. 1 Sal. 267.

So, on a *certiorari* for an original, the continuances ought not to be returned. 1 Sal. 269.

Otherwise, if it be only a misprision, or small variance in the name of the party, or in the time, between the original certified and the declaration. Vide Amendment, (D 8, 9.)

In action for a false return, if declaration sets forth a *fieri facias*, and a warrant to levy so much, which he had recovered against A., and the warrant is, to levy of the goods of A. so much as he had recovered against ———, (omitting the name,) it is good, the *fieri facias* being right. King v. Morris, T. 5 Geo. 2. Str. 909.

## (C 15.) What variance is not fatal: Special count upon a general writ.

So, a special count upon a general writ, is good. Vide Abatement, (G 8.)

As, in assize *de libero tenemento*, if the plaintiff is made *de quatuor acris saliceti commun. estoverior*, and of several rents. R. 8 Co. 47, 8.

In assize of frequent distress, if the plaint is, that he was so often distrained that he could not manure. 8 Co. 50. b.

If a *capias* be generally at the suit of the plaintiff, and the declaration *qui tam*, it is well enough. 2 Bl. 722.

In *quare impedit* for the king *præsentare ad ecclesiam quæ ad nostram spectat donationem* generally, count may be special, *quæ spectat ratione* [\*42]



*prærogative sua regia.* R. and aff. in parl. on a special demurrer for that cause. Ca. parl. 164.

In *quare imp. præsentare ad ecclesiam* generally, the count may show that he has only two turns, &c. 5 Co. 102. b.

So, a variance, by the addition of a thing not material is not fatal: [\*]as, in trespass for an assault and battery, the plaintiff declares that the defendant struck the horse on which the plaintiff rode, *per quod* the plaintiff fell; the variance between the writ which speaks only of the battery of himself, and the count which speaks also of the battery of the horse, is not material; for the stroke to the horse is only inducement to the battery of the plaintiff himself, and not alleged as the ground of the action. R. Mar. Pl. 107.

In an action for non-residence, the parish was styled in the declaration Saint Ethelburg; evidence that the real name was Saint Ethelburga; held a fatal variance. Wilson v. Gilbert, C. P. M. 41 Geo. 3. 2 Bos. & Pull. 281.

So, a variance as to damages between the writ and the declaration is not material. R. 2 Cro. 128. 629. Vide post, (C 84.)

*Quare clausum fregit* against two, and a declaration against one, holden regular. Spencer v. Scott, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 19.

In process not bailable, if the writ be joint and the declaration several, it is regular: *secus*, in bailable process. Ibid. p. 49.

If process be sued out in the name of two plaintiffs, and declaration be delivered in the name of one only, it is bad. Rogers v. Jenkins, C. P. H. 39 Geo. 3. Ibid. 383.

Writ sued by plaintiffs as executors, and declaration by them in their own right, held a sufficient variance for discharging the defendant out of custody on filing common bail. Douglas v. Irtam, B. R. M. 40 Geo. 3. 8 T. R. 416.

So, if the writ be "in a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, &c. Kerr v. Sheriff, C. P. H. 41 Geo. 3. 2 Bos. & Pull. 358.

### (C 16.) Pledges found upon a declaration.

The plaintiff in B. R. or C. B. ought to find pledges *de prosequendo*: for if he be nonsuit he shall be amerced. 2 Cro. 414.

And he must find them on a bill, where the clause *si fecerit te secur.* &c. is not inserted, as well as upon an original.

So, an attorney ought to find them, though he sues by attachment of privilege, where such clause is not inserted. R. Dy. 288. a. R. Cro. Car. 92. Hut. 92. R. 2 Lev. 39.

When pledges shall be found in replevin. Vide post, (3 K 5.)

The nature of pledges. Vide Bail (A—C).

They shall be found in debt *qui tam*. 1 Lev. 123.

But the king or an infant doth not find pledges; for they ought not to be amerced. 8 Co. 61. b. R. Cro. Ca. 161. 4 Inst. 180. 2 Leo. 185.

So, they are not found on an information. R. 1 Lev. 123. But the st. 4 & 5 W. & M. 18. requires security to be given for costs.

And the pledges shall be found on the purchase of the writ in chancery. R. 2 Cro. 414. 3 Bulstr. 279.

Or, before the sheriff, who may refuse to execute the writ, and return no pledges found. 2 Cro. 414.

Yet he may execute the writ before pledges found, if he pleases. 2 Cro. 414.

For it is sufficient if they are found at any time pending the plea. 2 Cro. 414. Mar. 46. 4 Inst. 180. Jon. 177.

At any time before judgment, though it be in appeal. R. 2 Jon. 154. Cont. in appeal. 2 Sho. 159. } Vide Baker v. Philips, 4 Johns. Rep. 190. }

[\*] And after judgment and error brought, want of pledges may be amended by the sheriff. R. 3 Lev. 345.

The pledges are usually entered on the bill or declaration at the end of the count. Dy. 288. a. 4 Inst. 180.

And, if no pledges were found, it was error by the common law. R. 2 Cro. 414. R. Dy. 288. a. R. 3 Bul. 61. R. Mar. pl. 40. Cro. Car. 594.

And the omission was not aided by the st. 18 El. 13. 2 Cro. 414. 3 Bul. 278. R. Cro. Car. 92. But Hut. 92. makes a *quære*. Acc. 1 Sid. 34. Per two J. Windh. cont. Ray. 51. R. Dy. 288. a. in marg. Jon. 177.

The omission is substance. R. 3 Lev. 39.

But, if there be no original, that is aided, and the pledges are to be entered on the original; and therefore want of pledges is no error when there is an original wanting. R. 1 Sid. 84. R. Jon. 177.

And by the st. 16 & 17 Car. 2. 8. after verdict no judgment shall be stayed or reversed in the courts of Westminster, county palatine, or grand sessions of Wales, because no pledges, or but one, are returned on the original.

And by the st. 4 & 5 Ann. 16. no exception shall be taken for default of entering pledges on the bill or declaration, unless it be specially shown for cause of demurrer.

On demurrer, and for cause that no pledges are on the writ, or mentioned in the declaration, judgment *pro quer.*, for he may enter pledges at any time before judgment. Mansfield v. Richman, P. 2 Geo. 2. Fort. 330. Barnes, 163. 3 T. R. 157.

On special demurrer, for that declaration is without pledges, if the paper book with pledges added is delivered to defendant, and he does not take notice of it; it is a waiver of the irregularity, and he is too late, when it is set down for argument. Umfreville v. Lock, M. 10 Geo. 2. B. R. H. 315.

On special demurrer, on action by bill, and for cause, no pledges; plaintiff may have leave to amend and add pledges. Watson v. Richardson, T. 21 & 22 Geo. 2. 1 Wils. 226.

So, if pledges are omitted, after error brought for it and assigned, the court will permit pledges to be entered. R. 3 Lev. 361.

Want of pledges cannot be taken advantage of in error, though the judgment was by default. How v. Denin, T. 2 Geo. 3. 2 Wils. 142.

The omission of pledges at the end of a declaration in K. B. is not demurrable. 3 T. R. 157.

So, if an infant attains his full age before judgment, and no pledges appear to be entered, it is not error; for if pledges were necessary when he came of age, they might have been entered before his age on the writ. R. Jon. 177.

### (C 17.) Count, or declaration, must have certainty.

And the count in every court ought to have certainty and truth. Co. Lit. 303. a. Pl. Com. 84. 122.

And the certainty ought to be such, that the court may give judgment upon it, the defendant answer to it, and a good issue be joined thereon. (Vide Co. Lit. 303. a. Pl. Com. 84.) } Vide Cunningham v. Kimball, 7 Mass. Rep. 65. Baylies v. Fettyplace, 7 Mass. Rep. 325. Grant v. Jack-



son, Kirby, 90. Society of South Farms v. Beckwith, Kirby, 91. Wooster v. Parsons. Kirby, 27, 29, 30, 31. }

There are three kinds of certainty ; 1. to a certain intent in general : 2. to a common intent : 3. to a certain intent in every particular. The last [\*] is rejected in all cases, as partaking of too much subtlety ; the second is sufficient in defence ; the first is required in a charge. Cowp. 682.

Certainty to a certain intent in general means, what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts. Dougl. 159.

Certainty to a common intent is sufficient in pleas in bar. Ibid. 158.

Certainty to a certain intent in general is all that is requisite in counts, replications, and indictments, and returns to writs of *mandamus* and *habeas corpus*. Ibid. 159.

Certainty to a certain intent in every particular is necessary in estoppels. Ibid. < Vide Hildreth v. Harvey, 2 Johns. Cas. 339. Oystead v. Shed, 12 Mass. Rep. 509. >

If there be any difference in point of certainty required between a civil and a criminal proceeding, the rule holds most strictly with the latter. 4 M. & S. 168.

< In covenant, the plaintiff declared, that the defendant covenanted to pay the plaintiff 250 dollars in manner following, viz. 125 dollars on the 20th of May ensuing, and 125 dollars on the 20th of May 1811, &c. and the assignment of the breach was, that the defendant had not paid the said sum of 125 dollars. It was held, on demurrer that the breach was not well assigned. Carpenter v. Alexander, 9 Johns. Rep. 291. >

### (C 18.) Certainty of parties.

And therefore the parties, demandant or plaintiff, tenant or defendant, ought to be well named.

If the plaintiff sue the defendant by a wrong christian name, and the defendant appear by his right name, the plaintiff may declare against him by such right name ; otherwise, if the plaintiff file common bail for him, according to the statute, by his right name. 3 T. R. 611.

What shall be a misnomer of the plaintiff or defendant. Vide Abatement, (E. 18, 19.—F. 17, 18, &c.)

When the omission or mistake of the name of a party vitiates the count or not. Vide Action on the Case, (H. 2.)

Any variation in the name of a corporation is fatal ; as, Austrialia for Australia. Turvil v. Aynsworth, M. 1 G. 2. Str. 787. Ld. Raym. 1515.

If a declaration by A. B. shows a title *cuidam* A. B., it cannot be intended to be the plaintiff. R. 2 Lev. 207.

If it charges *quod prædict.* A. B. *deposuit*, where two of the same name are mentioned before, it shall not be intended to be the defendant. R. Cro. El. 267.

But where there is mention of a manor or name before expressed, it shall be intended the same, though *prædict.* is omitted. R. 2 Cro. 192.

If plaintiff and defendant have the same name, if it appears on the record which is which, as an *oyer* of a bond from A. B. of C. to A. B. of D., and the declaration begins A. B. of C. was summoned, &c. ; it is sufficient, though the addition is not repeated again. Conner v. Conner, T. 8 G. 3. 2 Wils. 386.

The *alias dict.* must be in the same language as in the deed. Barnes, 241.

< A corporation plaintiff may declare in its corporate name, without setting forth the act of incorporation, though it may be a private act. U. S. Bank v. Haskins, 1 Johns. Cas. 132.

So a town may sue by the description of *A. B. and the rest of the inhabitants of* [\*45]

*such town*, instead of using the corporate name merely. *Barkhamsted v. Parsons*, 3 Conn. Rep. 1.

But in a suit by a mercantile company, the names of the individual partners must be stated. Thus, where the declaration commenced in this manner, "A. B. C. and company complain," &c. it was held to be bad on general demurrer. *Bentley v. Smith*, 3 Caines' Rep. 170.

It has been held, that a similar defect would be cured by verdict. *Pate v. Bacon*, 6 Munf. 219.

In *indebitatus assumpsit* against a surviving partner, for goods purchased before the death of the other partner, the partnership, death and survivorship need not be alleged. *Goelet v. M'Kinstry*, 1 Johns. Cas. 405. *Secus*, if a suit be brought by survivors. *Holmes v. D'Camp*, 1 Johns. Rep. 34. *Cont. Vandenheuvel v. Storrs*, 3 Conn. Rep. 203.

The addition to the name of a party, of *junior*, is no part of the name, but merely a description of the party, by use. *Kincaid v. Howe*, 10 Mass. Rep. 203.

So the addition of *agent*, is merely *descriptio personæ*. *Buffum v. Chadwick*, 8 Mass. Rep. 103. >

### (C 19.) Certainty of time.

So, the time of a matter charged in the declaration ought to be certainly alleged; and therefore in *assumpsit*, if the plaintiff omits the day when the promise was made, it is bad. *Yel.* 94.

So, in *trover*, if he omits the time of the conversion. *Cro. El.* 97.

If he declares on a lease for years made to him, he ought to show the day when the lease was made. *Pl. Com.* 24. a.

So, in all cases where the day or time is issuable. *Pl. Com.* 24.

A negative averment need not be alleged with time and place. *5 T. R.* 607.

So, the time of every fact, material to maintain the declaration, ought to be alleged: as, in *trover*, the time of the conversion as well [\*] as the time of the possession by the plaintiff, and of the finding by the defendant, ought to be alleged. *R.* for the conversion is material and traversable. *Cro. El.* 97, 98.

In *rescous* of a distress for rent, the days of payment for the rent ought to be alleged. *Kitt.* 227. a.

In *trespass* for detaining his servant, the plaintiff ought to show the time of his retainer. *Pl. Com.* 24. a.

"That the defendant, on the sixth of May, and on divers other days and times between that day and the commencement of the suit, assaulted the plaintiff," is bad. *Cowp.* 828.

In assigning a breach upon a covenant, it is well to say, that the defendant *on divers days and times* did acts in breach of the covenant. *R. Ld. R.* 473.

But in an action on a penal law, different offences must be stated distinctly; alleging that the defendant *on divers days and times* committed offences, would be bad. *D. Ld. R.* 479.

If the defendant pleads a release, he ought to show the day of the making of it. *Pl. Com.* 31. a.

So, if no time be alleged but after a (*viz.*), and the time there mentioned be repugnant, by reason of which the *viz.* shall be rejected, then the declaration is bad for want of time. *Lut.* 201. *Vide infra.*

If the defendant pleads a fact which is traversable, but not local, he ought to allege it to be at the time and place mentioned in the declaration. *R. Lut.* 14.

If the declaration state a corrupt contract made the 21st December, 1774, giving day of payment to the 23d of December, 1776, and issue be joined on it; evidence

of a contract on the 23d of December, 1774, for two years, will not support the issue. Cowp. 671.

But it is sufficient if the time be in the declaration, though it be not in the writ recited by the declaration. Vide ante, (C. 12.)

Or, if a thing may be coupled to a time before alleged: as, in trespass *quare clausum fregit et adtunc et ibidem insult. fecit et cistam cepit*, it is good, though no time is repeated for the taking of the chest. R. 2 Cro. 443.

On information in debt for duties on goods imported in May, evidence may be given of several importations at several times. Att.-gen. v. Hatton, H. 1728, Bunb. 262.

On information in debt for nonpayment of duties, evidence may be given of an importation several years before the time laid; but the court will, on application, confine the evidence to a certain time. Att.-gen. v. Weeks, M. 1726, Bunb. 223.

In *assumpsit*, if it be alleged that A. determined *quod prædict.* 100 guineas fuer. valoris &c. viz. apud B. R. Lut. 487.

Or, if time be alleged to a thing tantamount; as, in trover, if the plaintiff shows a time of request and refusal to deliver, though no day of conversion be alleged, it is sufficient; for a refusal to deliver on request amounts to a conversion. R. Cro. Car. 262.

So, to a negative matter no time need be alleged. Pl. Com. 24. a.

So, in real actions, no certain time is necessary, for *tempore pacis, tempore dom. reg. nunc, or nuper reg.* is sufficient. R. Sal. 561.

So, in *quare impedit*. Ibid.

And, if a more certain time is mentioned, it is not material or traversable. Ibid.

[\*]So, it is sufficient, though it be imperfectly alleged: as, in trover, if the plaintiff says that he was possessed 9th May, of goods and lost them, and *postea, scil.* 1st May, converted them, it is good, though the conversion is alleged to be before the loss: for *postea* is sufficient, and the day shall be rejected, being after the *scil.* and repugnant. R. 2 Cro. 428.

So, in covenant, if plaintiff declares on articles, dated 30th September, 5 G. (which is 1718,) and then says, *postea scil.* 1st May 1718; this *scil.* shall be rejected, as inconsistent, and then it will stand that he covenanted the 30th September, and *postea* committed the breach. Hayman v. Rogers, M. 6 G. Str. 232.

If plaintiff declares against the parson, that he left his tithes on his field, *per quod* he lost the use of that part under the cocks, from 20th August, the time of cutting, to 20th December, it is well enough, though the parson was not obliged to carry them away on the 20th August; for the jury may apportion the time, or the plaintiff release it. South v. Jones, M. 6 G. Str. 245.

Or, in trespass in Michaelmas term, for an assault 18th October, and imprisonment for twenty-five weeks, which is long after action depending, Webb v. Turner, T. 11 Geo. 2. Str. 1095. Andr. 250.

Debt on bond for not performing award; plea that arbitrators did not make award on or before 21st May. Replication, that arbitrators, after making bond, and before exhibiting plaintiff's bill, to wit, on 21st May, did make award; this is a sufficient allegation. R. on special demurrer. Bissex v. Bissex, T. 5 Geo. 3. 3 B. M. 1729.

So, in ejectment, if the plaintiff declares on a lease 3 *Maii virtute cuius* he entered and was possessed, till the defendant *postea scil.* 1 *Maii*, ejected him, the day after the *scil.* is repugnant, and shall be rejected; for it is sufficient that he entered *virtute dimissionis et postea* was ejected. R. 2 Cro. 96. But this judgment was disapproved by the Ch. J. 1 Sid. 8. R. acc. 2 Cro. 186. 662. 454. R. 2 Bul. 29.

So, if there was a blank for the day. R. 2 Cro. 312.

So, if a man pleads that before the obligation, *scil.* 1 Oct. and the day

mentioned is after the obligation, it shall be rejected as repugnant, after a demurrer, as well as after verdict. R. 1 Lev. 194.

But, if by the rejection of a day impossible or repugnant, no time appears when the fact was done, it is bad: as in *assumpsit*, if the plaintiff declares on an *indeb. assumpsit* and then adds another count, which begins *cumq. etiam defl. postea, scil.* 1 *Maii*, (which day is before the time alleged in the first count,) this is bad; for, if the day after the *scil.* is rejected, no time appears for the promise in the second count. R. after verdict. Yel. 94.

So, if the jury find a lease made 1 *Maii habend. a die dat., virtute cujus* plaintiff *eodem* 1 *Maii*, was possessed *quosq.* defendant *postea (viz.) eodem* 1 *Maii*, ejected him, it is bad; for if the day after the *postea* is rejected, no time appears when the ejectment could be, for *postea* does not import that the ejectment was after the lease commenced, which did not commence till the 2d May. R. after verdict. 1 Sid. 8.

So, by the stat. 16 and 17 Car. 2. 8., after verdict judgment shall not be stayed, or reversed, for a mistake of the day, month, or year in any declaration, &c. where the right day, month, or year in the same, or any preceding writ, plaint, roll or record, is once truly alleged. Vide Amendment, (K 1, 2.)

[\*]So, if the day alleged be impossible, or after the trial, it shall be aided after verdict. R. 8. W. 3. Wall v. Duke, (Vide Ca. B. R. 105.) R. M. 8 W. 3. B. R. Blackall v. Heall, (Com. 12. Carth. 389. 5 Mod. 286. Ca. B. R. 102.) Vide post, (3 M. 5.)

But before, the omission of time to a material fact was not aided by a verdict. R. *ut dicitur* Cro. El. 97, 98. Per two J., but three cont. Cro. El. 377.

Where time is laid under a *scilicet*, it does not vitiate; as if in debt on bond, defendant pleads payment before the day. Cowne v. Barry, M. 7 Geo. 2. Str. 954.

{ In action by the indorsee against the indorser of a promissory note, it is not necessary to allege in the count the precise time of demand and notice, the proper time may be made out in evidence. Norton v. Lewis, 2 Conn. Rep. 478.

A declaration containing two counts, in one of which, a cause of action is alleged, which has not accrued at the commencement of the suit, and a general verdict for the plaintiff, is bad. Stewart v. M'Bride, 1 Serg. & Rawle, 202.

So if an action be brought for a sum of money, and it appear from the declaration that the money was not due until after the commencement of the suit, and a verdict and judgment, for the plaintiff, it will be error. Gordon v. Kennedy, 2 Binn. 287. }

### (C. 20.) Certainty of place.

So, in a declaration, a certain place ought to be alleged, where every fact material and traversable was done. Vide Kit. 226. Vide ante, (C 19.)

In what county an action shall be alleged, vide Action, (N 1, 2, 3.)

As, in trover, a place of conversion ought to be alleged. R. Cro. El. 78. 97.

So, in ejectment the place is material. Boddy v. Smith, T. 10 G. Str. 595.

So, in trespass for taking of corn, if the defendant justifies for the toll of grain brought to market to be sold, and sold the place of sale ought to be alleged, and it shall not be intended sold in the market, unless it be so said. R. Lut. 1501.

In debt on a bond, the plaintiff ought to count where the bond was made, though it be without a date.

[\*18]

In debt, the description of the place is not material; in trespass it is. *Oats v. Machin.* T. 10 Geo. Str. 595.

So, in an action on the case, that the defendant holds land in A. *ratione cujus* he ought *mundare fossas*, he must show in what place the ditches are. *Kit.* 226.

So, if in debt on an obligation against an heir, the defendant pleads *riens per descent*, and the plaintiff replies *assets*, if he does not allege a place where the assets are, it is error. R. 2 Cro. 503.

So, in an action on the case for abusing a horse in a journey, which was hired of S. at P., he ought to allege the place where he was abused. *Semb.* Ray. 187.

So, in covenant, if the plaintiff alleges a breach by sentence in the spiritual court, he ought to allege the place where the spiritual court was held, and if the place of the spiritual court when the proceedings commenced, be mentioned, it is not sufficient; for it shall not be intended to have continuance in the same place, if it is not alleged. R. Lut. 305.

So, in an action on *assumpsit*, a place of the performance of the fact, averred to have been done as the consideration of the promise, ought to be alleged. R. Sho. 50. Sal. 22.

So, in an indictment against a miller, for substituting other meal, a venue must be laid to the receipt. 4 M. & S. 214.

As, if the consideration be, that he consents to, and does not hinder a marriage; he ought to allege a place of consent. R. 2 Lev. 227.

So, in a plea, there ought to be alleged a place for every fact, which is triable and traversable. Lut. 1466.

[\*]And therefore if the defendant pleads a release, he ought to allege a place where it was made. R. Lut. 1142. 1501. R. Cro. El. 66. 78, 98. R. H. 4 Ann. in C. B., *Barker v. Palmer.* (Com. 141.)

So, in a replication; for if the defendant pleads, that being an attorney of C. B. he ought not to be sued elsewhere without his consent, if the plaintiff replies that he did consent, and does not allege a place for a venue, it will be bad. R. Sal. 4.

Replication to a plea of *ne unques accouple*, stating a marriage at Edinburgh, in Scotland, without laying any venue in England, is unobjectionable. 2 H. B. 145.

And there ought to be a certain place alleged, where the fact was traversable, though the issue be on another point. 2 Leo. 22.

And if there be not, it is error; for it prevents the defendant's taking issue on it. *Ibid.*

Venue may be laid in either of two counties in which facts, equally essential, happened. 2 T. R. 241. 7 T. R. 583.

Thus, in an action for driving a distress out of the county, the venue may be laid either in the county from, or in that into which it was driven. 2 Taunt. 252.

And where the cause has arisen in foreign parts, the cause may be laid as arising in England. *Cowp.* 177.

In torts arising out of contracts, the venue should be laid in the place where the injury is received. 4 Taunt. 729.

But no place is necessary for a thing which is only inducement. R. Pl. Com. 190. b.

So, two places for the same fact is bad. R. Dal. 106.

The place alleged ought to be the county and the parish, hamlet, or other known place in the same county. Cro. El. 260.

It is sufficient, if the county be in the margin, and the declaration only mentions the county aforesaid. *Vide infra.*

But, a fact alleged in a hundred only, is bad. Cro. El. 260.

Or, in a ward only; for it is in the nature of a hundred. R. Cro. El. 260.



Or, in a county only, without naming a parish, vill, hamlet, or known place in the same county. R. after verdict, Hob. 89. R. 2 Cro. 150. R. 1 Sid. 178.

It is now sufficient to state a county, without a parish. 3 M. & S. 148.

Or, the manor of S., without saying in what county. R. 2 Cro. 27.

Or, at Whitehall, Tower-hill, &c. Semb. 1 Vent. 119.

So, if the county be in the margin, and the declaration alleges a fact at H. in the county aforesaid, it is sufficient; for it shall be referred to the county in the margin. 2 Cro. 96. R. 2 Cro. 618.

Though another county be mentioned, by way of recital, in the declaration before. R. Cro. El. 436. Cont. Cro. El. 101. 311. R. Cro. acc. El. 465.

"The county aforesaid" always refers to that in the margin. 2 Blk. 847. 3 Wils. 339.

And the venue in the margin may aid, but cannot vitiate. 3 T. R. 387.

{ So where no venue is laid in the body of the declaration, the venue in the margin is sufficient. State v. Post, 9 Johns. Rep. 81. }

And in an *indebitatus* count, the venue laid at the beginning pervades the whole. 2 T. R. 28.

So, it is sufficient, if the declaration says, that the house demised is situate in *et super acclivitat. de H.* R. per three J. 2 Vent. 272.

But, in an inferior court, if the taking be alleged at A., it shall not [\*]be intended to be within the jurisdiction, though the court be in the margin. R. 2 Cro. 96.

So, if an addition be of the parish of A., without saying in what county, it is not good, though the county be in the margin. R. 2 Cro. 167.

If it be coupled with a place alleged before, or after; as in debt for non-payment of 100 guineas, pursuant to the judgment of A., and that the aforesaid 100 guineas are of such a value, viz. *apud N.*, though no place is alleged where the judgment of A. was given, it is good, being coupled with the value of the guineas. R. Lut. 487.

So, in trespass, *quare warren. fregit, et cuniculos fugavit*, without saying, *ibidem*, is good.

So, in an indictment, *quod intravit et disseisivit*, without saying, *adunc et ibidem*. R. 2 Cro. 41.

In trover, *quod navem diripuit, nec non bona asportavit et convertit*. R. Sho. 180.

In debt on a bond to pay. if A. dies before the 1st of May, without issue then living; if it is alleged that A. died, having B. his son in *plena vita apud D.*, it is sufficient, though he does not say where he had issue; for it shall be tried at D., where the issue was living. Per three J. Dy. 15.

So, if the plaintiff, in debt for nonperformance of a contract in the embroidery of a gown, alleges a retainer at such a place, and the time of embroidering it, but does not allege any place where the embroidery was to be done, and it is traversable, whether the defendant embroidered or not, yet it is good; for it shall be intended at the same place where the retainer was. R. Cro. El. 880.

So, if the plaintiff alleges, that he was scised of the parsonage of M., in M. aforesaid, and of the parsonage-house, and prescribes for a way from the said house to A., but does not say in what place the house is, yet it is good; for it shall be intended to be in M. R. Cro. El. 898.

In trespass, the plaintiff alleged that the defendant put filth so near his house in L., and permitted the water in the defendant's yard to flow, *per quod* the walls of the plaintiff's house were damaged without saying where he put the filth or permitted the water. R. good, Hard. 61.

[\*50].

In debt on a bond, the defendant pleads a pardon; the plaintiff replies, that the bond was to the use of a receiver; no venue, where the bond was made, is necessary in the replication; for it is admitted by the plea that there was such a bond. R. Hard. 187.

In *assumpsit* to convey land, if the defendant pleads performance, it is not necessary to say in what place he conveyed it; for it shall be intended on the land. R. Mar. pl. 51.

If the plaintiff alleges seisin in the defendant of a mill in D., and a nuisance by raising the mill banks, without saying where the banks were. R. 2 Cro. 555. 557.

If the plaintiff alleges a demise at H., and a distress in parcel demised, without saying where it was; for it shall be intended in H.

If he alleges an assignment by the sheriff of a term for years extended by him, without saying where; for it shall be intended where the land lies. R. 2 Mod. 304.

[\*]If the fact is, in its nature, local.

An averment that a fact happened at Fort St. George aforesaid, is a sufficient allegation of place, if the situation of the fort has been previously stated, thus, at Westminster, &c. 5 T. R. 607.

A., late of X., in the county of B., with force and arms, at the parish aforesaid; does not imply that X. is a parish. 5 T. R. 162.

So, in a plea to the person of the plaintiff, as misnomer, bad addition, alien. &c., a place for the venue is not necessary; for it shall be tried where the action is brought. R. 1 Sal. 2. 6.

So, in pleas in abatement for nonjoinder of parties, a venue is unnecessary; and if laid, surplusage. 7 T. R. 243.

So, if judgment be by default, after a writ of inquiry, it is not material, though no place be alleged where the promise was made; for the inquiry ought to be of nothing but damages, and this may be by any jurors of the county. R. Lut. 239.

So, if the fact to which no venue is alleged, be admitted by the bar, it is good. Vide post, (C 85.)

Or, the issue does not require a venue of that place. R. Noy. 9.

So, by the stat. 16 & 17 Car. 2. 8. after verdict, the things there mentioned, or any other of the like nature, not being against the right of the suit, or whereby the issue or trial are altered, shall be amended.

But before, the omission of a place, when it was material to be alleged, was not aided by verdict. R. Cro. El. 78. 98. Per two J., but three cont. Cro. El. 377. Adm. Cro. Car. 525.

Defects in the statement of the venue, can now only be objected to by special demurrer. 3 T. R. 387. 7 T. R. 583.

From what place a jury shall come. Vide Amendment. (H. 1, 2.)

{ A declaration without a venue, or with a wrong one, is merely informal, and is available only on special demurrer. Briggs v. Nantucket Bank, 5 Mass. Rep. 94.

In slander, the declaration was entitled *Dauphin County*, ss. and stated, that the defendant on, &c. at *Cumberland county*, viz. at the county of *Dauphin* aforesaid, in a certain discourse, &c. then and there uttered, &c. This was held good after verdict. *Wills v. Church*, 5 Serg. & Rawle, 190. }

### (C 21.) Certainty of the thing demanded.

So, a declaration ought to have certainty of the thing demanded; and therefore, in trespass for taking his fish, the declaration is bad, if it does not show the number and the kinds of fish in certain. R. 5 Cor. 35.



So, in trespass *quare in separal. piscar. sua piscat. fuit, et pisces cepit*, without mentioning the quantity or species. R. 1 Vent. 272. Dub. 1 Vent. 329.

In debt *pro 40 quarteriis frumenti*, without saying of what species, the declaration is bad. Cro. El. 837.

Or, *pro 40 ulnis pann.*, without saying of wool, or what other materials. Ibid.

{ In a count for the breach of a covenant in a deed, it is sufficient to state, that the defendant conveyed to the plaintiff certain lands *in the said deed particularly mentioned and specified*, without further description. Dunham v. Pratt, 14 Johns. Rep. 372. }

### (C 22.) Certainty in other circumstances.

It ought to show plainly and certainly all circumstances material for the maintenance of the action; for if there are two intendments, it shall be taken most strongly against the plaintiff. Pl. Com. 202. b.

As, in debt upon a contract to pay 20s. upon waste done, and plaintiff shows that defendant committed waste; it is not sufficient without showing how the waste was done.

In rescous on a distress for rent, he ought to show on what days the rent was payable. Kit. 227. a. Vide 8 East, 130.

In an action upon the case by a parson, who entitles himself by the resignation of B. for dilapidations, he ought to show how the resignation was made. R. Lut. 116.

[\*] In an action upon the case, for overloading his horse, he ought to show how or with what weight he overloaded him. R. 2 Leo. 104.

In prohibition upon a discharge of tithes by unity at the time of the dissolution, he ought to show such an unity, by which he may be discharged. R. Hob. 296, &c.

In pleading, it is unnecessary to allege what need not be proved. 7 T. R. 4.

The court will censure an unnecessary length of pleading. 1 Blk. 270.

If a party, in pleading, use a generic term, comprising, therefore, many species or particulars, and afterwards use an averment, defining which particular or species of the number he insists on, he is tied up to that particular one. (The reason may be, because he leads his adversary to suppose he only means to rely on that, who therefore confines his proof accordingly.) 3 T. R. 307. 2 M. & S. 379.

If the defendant pleads a fact which lies as much within his own as the plaintiff's knowledge, he must plead it particularly. The plaintiff is aware of the fact, but he cannot know what particular part of it the defendant relies on. 2 M. & S. 378.

Every indictment ought to be so framed as to convey to the party charged, a certain knowledge of the crime imputed to him. If expressions are used, which leave it in doubt whether all of several facts, or some only are charged against him, subsequent averments must be used, defining and tying up this generality. Thus, in an indictment for perjury, or for obtaining money under false pretences, the word "falsely," &c. leaves it in doubt (from its received signification on those occasions,) what of the facts alleged are meant to be charged as false, and which, therefore, the defendant must come prepared to deny. The prosecutor, therefore, must go on, in order to give the defendant certain notice of the very charge, to separate, by specific averments, all that is meant to be relied on as false. It is true, indeed, that the indictment might negative, one by one, every one of the facts, &c.; and that that would not vitiate, though some were true. But the law will not suppose that that will be done, if it be in the knowledge of the prosecutor, that some of them are true. An indictment for obtaining money, &c. for want thereof, was held bad on error. 2 M. & S. 379.

If a custom is alleged, that such a one has a right to his freedom, paying a rea-

reasonable fine, and the evidence is, that he should pay 6s. 8d., it is well enough laid. *Moor v. Mayor of Hastings*, H. 10 G: 2. Str. 1070. B. R. H. 353.

{ In an action upon an agreement, within the statute of frauds, it is unnecessary to allege, that the agreement was in writing; that is matter of evidence only, and after verdict, the court will presume that it was proved to have been in writing. *Elting v. Vanderlyn*, 4 Johns. Rep. 237. Vide *Miller v. Drake*, 1 Caines' Rep. 45. *Nelson v. Dubois*, 13 Johns. Rep. 177.

Where, on the sale of goods, the vendor agreed to accept payment in notes to a greater amount, and to pay the difference, the agreement to pay the difference is an essential part of the contract, and must be stated. *Roget v. Merritt*, 2 Caines' Rep. 117.

In debt on an award, the plaintiff may set forth those parts only which are in his favour, and sufficient to support his demand. *M'Kinstry v. Solomons*, 2 Johns. Rep. 57. *Diblee v. Best*, 11 Johns. Rep. 103.

Where one of several heirs is sued on his promise to pay the debt of his ancestor, the plaintiff may omit the allegation of assets. *Elting v. Vanderlyn*, 4 Johns. Rep. 237.

If a penal statute gives no form of declaring, the plaintiff must state specially the cause of action. *Cole v. Smith*, 4 Johns. Rep. 193. *Bigelow v. Johnson*, 13 Johns. Rep. 428.

Where a statute giving a penal action, contains a proviso or exception merely furnishing matter of excuse or justification to the defendant, the plaintiff need not negative it, but the defendant must plead it. *Teel v. Fonda*, 4 Johns. Rep. 304. *Bennet v. Hurd*, 3 Johns. Rep. 438. Vide *Blasdell v. Hewitt*, 3 Caines' Rep. 137. cont. overruled.

The cause of action must be correctly stated: Thus where a promise is made to a copartnership, which, by the death of the other partners, has survived to the plaintiff, he must declare accordingly. *Vandenheuvel v. Storrs*, 3 Conn. Rep. 203. }

### (C 23.) Declaration must be sensible.

So, if the declaration be repugnant or insensible, it will be bad: as in trespass for taking away timber *jacen. erga confectionem domus nuper ædificat.*; for it cannot be for the building of a house which is already built. R. 1 Sal. 213. 458.

So, in covenant, and a breach assigned *quod durante tempore quo servivit he departed from his service.* R. 1 Sal. 213.

So, in an action upon the statute of usury, that A. lent to B. and *pro dando* to A. such a day of payment, he agreed. R. Semb. cont. 1 Sal. 325. Vide post, (C. 25.)

So, if the declaration has a blank for a day or place, or other material thing, whereby it is insensible, it will be bad. R. 2 Cro. 493.

A replication is repugnant, if it demand the whole sum, and acknowledge satisfaction of part. 4 Burr. 2482.

{ A declaration in assumpsit against husband and wife, alleging a request, and promise by husband and wife, during coverture, is bad, for the wife cannot be sued upon a mere personal contract made during coverture, though joined with her husband. *Edwards v. Davis*, 16 Johns. Rep. 281. }

[\*](C 24.) But certainty to a general intent is sufficient: What certainty is required in a bar. Vide post, (E 5, 6, &c.)

But in a count, a certain intent in general is sufficient. Co. Lit. 303. Vide Action upon the Case upon *Assumpsit*, (A. 3, 4.)

As in *assumpsit* to pay so much if he marries the daughter of the defendant at his request, if he says that he did marry her, without saying, at the defendant's request, it is good; for it shall be intended. R. Cro. Car. 194, 5.

In account as receiver, till the feast of S. Mich. without saying what S. Mich. viz. S. Mich. in *Tumba*, or S. Mich. *Arch.* ; yet it is good ; for it shall be intended S. Mich. *Arch.* which is the most known and notorious.

In debt on an indenture, which contains an agreement for a marriage between him and A. if the ecclesiastical law permits, if he counts of a request to marry and that A. refused, it is sufficient, without saying he requested to marry at a canonical time.

In an action on a statute, which gives to all subjects, &c., if the plaintiff alleges that he is *modo subditus*, it shall be intended that he was so at all times. R. 1 Lev. 121.

In *assumpsit* to satisfy for goods, if he says, that so much is *minus satis* to satisfy him, it is sufficient ; for if the plaintiff does not demand more, he must be content with so much. R. 2 Cro. 552.

An averment in pleading need not be in precise terms ; if by reference it incorporates what has been said before, it is considered as repeating it over again, where such repetition is essential. 6 T. R. 573.

A general reference to former parts of the record, without repeating such parts, is only allowable where the reference is to something definite and certain. 7 East, 492.

Where forbearance of a debt is stated as the consideration of a promise, though it is not expressly averred, yet if it appear by necessary intendment to whom the forbearance was, it is sufficient after verdict, and perhaps on special demurrer. 1 N. R. 172.

The word "tenor" implies and binds the party to an exact recital. Dougl. 194.

The words, "purporting to be a bank note" in an indictment, mean that the note upon the face of it, appears to be a bank note ; and the want of such appearance cannot be supplied by evidence of representations of the party when he disposed of it. Dougl. 300.

The words "in manner and form following, that is to say," do not bind the party to an exact recital. Dougl. 193.

The word "to," when applied to time, may have either an inclusive or exclusive signification. 1 Smith, 437.

The word "until," is capable of either an exclusive or inclusive sense. The information alleged, that the defendant held certain offices in the service of the East India company, from, &c. until the 29th Nov. 1795 ; and afterwards charged, that each of the defendants, whilst he held and exercised the said office as aforesaid, did, to wit, on the 29th Nov. 1795, receive a certain present, &c. Held, that the word until, was capable of an inclusive meaning, and that it appeared from the context, to have been intended in that sense. 5 East, 244. 1 Smith, 437.

Since fraud either implies knowledge, or may exist without it, in averring it, the word "*fraudulenter*," without "*sciens*," is sufficient. "*Sciens*" also, is sufficient by itself, since knowledge that an assertion is false, imports fraud. 3 T. R. 60.

[\*]The term "advisedly," is equivalent to knowingly. 1 B. & P. 180.

The averment wrongfully intending to injure, is equivalent to maliciously. 1 East, 563.

The term "agreement," imports mutual promises. 2 N. R. 62.

The words "sold and delivered," imply a contract, since there cannot be a sale, unless two parties agree. 2 T. R. 30.

The alleging a seisin in fee, virtually includes an occupation by the party seised ; to allege in addition, that the party is in the occupation of the land, is superfluous. 4 M. & S. 387.

The replication to a plea, claiming turbary in right of an ancient messuage, averred, that divers ancient messuages besides the defendant's, &c. Held, that this was a sufficient averment that the defendant's messuage was an ancient one. 5 T. R. 412.

A claim, that the lord is seised in fee of mines underneath the copyholds, to-  
[\*54]

gether with the liberty of boring for, &c. imports a right to exercise the same during the continuance of the copyholder's estate. 10 East, 189.

An averment, that from time immemorial, until the division of a tenement into moieties, the lord had been accustomed to take such an heriot, and since the division, had been accustomed to take such another, imports that the division was made before time of memory. 9 East, 184.

Under a plea in avoidance of a contract given for the price of goods, that they were sold by the plaintiff to the defendant, to be by him applied to such an illegal purpose; it must be taken, that they were furnished for the purpose of transgressing the law. 1 B. & P. 551.

An averment that goods to be delivered to A. were to be paid for on delivery, sufficiently expresses, after verdict, at least, that payment was to be made by A. 3 Taunt. 423.

If the memorial of an annuity, state that the consideration was paid to both grantors, when in point of fact, it was to be appropriated by one alone; a party seeking to avoid the annuity for such defect in the memorial, must state that it was to be so appropriated; merely averring that it was paid not to both, but to one only, is not sufficient, since payment to one is *prima facie* payment on account of, and therefore to both. 4 T. R. 585. 2 H. B. 280.

If the memorial of an annuity, states the payment of the consideration money to have been made by the grantee, when in point of fact, it was made by his agent, it is defective. And though a plea to an action on the annuity bond, simply denying that the money was paid by the grantor, is not sufficient to raise the objection to the memorial, (since the import of such plea is, that neither in law nor in fact, was payment made by the grantor. 4 East, 85.) Yet a plea, that whereas the memorial affirms that the grantor paid the money; now payment was made by his agent; is sufficient. 3 M. & S. 82.

An averment in a plea, justifying a commitment for disturbing judicial proceedings, that the plaintiff made a great disturbance and obstructed the defendants, &c., sufficiently shows that the disturbance was the manner of obstruction. 1 Taunt. 146.

Falsehood may exist without fraud. An averment, therefore, or proof that an assertion was false, is no affirmation that it was fraudulent. 3 T. R. 60.

An averment in pleading, that A. and B. have not done an act, means that both together have not performed it; it does not exclude the supposition, that A. by himself, or B. by himself has done the act. 4 M. & S. 33.

An averment, that the plaintiff retained the defendant, does not import that it was for hire or reward, unless the defendant is a public officer or innkeeper. 5 T. R. 143.

The averment, that money has been expended in repairing premises, does not *ex termini* import that the repairs were necessary. 1 T. R. 454.

[\*]Bond for the performance of an award "so as it be made in writing under the hands of the arbitrators," by such a day. The declaration avers, that the arbitrators did in due manner, and within the time limited, duly make their award in writing. Held, on error after judgment for plaintiff, on plea of judgment recovered, insufficient, without alleging that it was under their hands. 2 Mars. 304. 6 Taunt. 645.

An averment, that "A., and all those whose estate he has from time immemorial were accustomed, and during all the time aforesaid, ought to have common," is not equivalent to claiming it at all times of the year. 2 B. & P. 359.

Under a plea, stating that the corporation of B. was a prescriptive corporation, and then setting forth a charter by which the citizens and inhabitants of C. were incorporated, not stating that they were then a corporate body, the continuance of the prescriptive corporation is not to be intended. Therefore, a replication, that at the time of granting the charter they were not a corporation, is bad. 1 T. R. 590.

The question in a criminal case, turned upon a note, which was averred to be a note for 20*l.*; since this might mean pounds weight: held, that it should have been

~~Declared on as~~ meaning 20*l.* in money. Anon. mentioned by Chambre, J. 1 Mar. 214.

In action for maliciously holding to bail in an inferior court, for 30*s.*, it is not necessary to set forth for what sum the court can hold to bail ; for by 12 Geo. 2. no court can hold to bail for less than 40*s.* Smith v. Catel. P. 8. Geo. 3. 2 Wils. 376.

(C 25.) And the words shall have a reasonable intendment.

And words shall have a reasonable intendment and construction. Vide Action upon the Case upon Assumpsit. (A 5.)

And therefore in assize, if a man complains that the king seised of such a park granted *officium parci sui*, without saying (*prædict.*), yet it is good ; for it shall be intended the park before mentioned, *prædict.* being mentioned before and after. 8 Co. 57.

If the plaintiff alleges a demise to A. *virtute cuius* he entered, it shall be intended that he entered immediately. R. Lut. 108.

If a *cap. utlagat.* or other judicial writ be pleaded, as issued such a day, and it is not said to have issued in term time, it is good ; for it shall be intended, when no cause to the contrary appears. R. Lut. 333.

If it be pleaded that A. was seised, that he died seised, without saying who ; it shall be intended that A. died seised, it being said before that he was seised. R. Lut. 1172.

If an usurious agreement be alleged between A. and B., and that A. the lender *pro dando diem solution.* to A. *haberet* so much ; it shall be intended that it was *pro dando B. diem solutionis A.* 1 Sal. 325.

If the declaration says *quod def. prosecut. fuit et adhuc prosequit.* suit ; it shall be intended, at the time when the action was commenced. R. 3 Mod. 103. 4 Mod. 152.

In case on promissory note, set out to be made 2d November, to pay on the 31st December *next* ; *next* shall be intended next after the date of the note, not next after the action brought. Carbonel v. Davis, M. 7 Geo. Str. 394.

If a declaration in waste be *quod A. feoffavit B.* to the use of C. and his heirs, it is sufficient, without saying *quod feoffavit B.* and his heirs. R. Mo. 871.

So if an action be several in its nature, such precise certainty is not necessary ; as, in an action on the stat. 2 & 3 Ed. 6. as rector of the [\*]churches of D. and S., for not setting out his tithes on 400 acres of land in D. and S. ; it is sufficient without saying how much land in D. and how much in S. ; for it is in the nature of trespass. R. 2 Lev. 1.

Unless where expressions have a technical and definite signification, they are to be construed in that sense in which, from the context, the reason of the thing, they appear to have been used. 5 East, 244. 1 Smith, 437.

Expressions which for a long time, and which may be proved from precedents, have been used in pleading in an indefinite sense, though in strictness they may admit of a definite one, yet shall be construed in the former. Thus, it has been the constant practice on indictments for perjury, and likewise in those for obtaining money under false pretences, to aver, not merely that the defendant “falsely,” &c., but to go farther, and assert by specific averment, that “whereas in truth,” &c. The inference from this is, that all the facts following the word “falsely” are not meant to be charged as false, for usually there is no necessity they should ; if they were, where is the use of the other specific averment ; and that it is left to the specific formal averment to determine what the prosecutor means to charge as false. Hence, *falsely* is a word of uncertain unspecific, and therefore insufficient averment in such cases. 2 M. & S. 379.



Where an averment admits of two intendments, that shall be preferred which will support the pleading. 6 T. R. 134.

The court will make any intendment against a mere captious objection. 1 T. R. 117.

In pleading, where, after stating that a fact happened on such a day, it is averred, whereupon it was done so and so; the word "whereupon" refers to the time last stated, so as to be a sufficient averment that the latter fact happened on that day. Hence, where the record of an outlawry, after stating that the *capias* was returned on such a day, proceeds; whereupon the *exigent* was awarded, it is a sufficient averment that the *exigent* issued on that day. 6 T. R. 573.

The averment, "the king's seal of Great Britain," means the great seal. 4 T. R. 521. 1 Taunt. 71.

The averment "his majesty's court of the bench (7 Taunt. 271.) at Westminster," means the court of common pleas; for supposing that the words "court of the bench" are equivocal, the addition, "at Westminster," designates by its locality, the court of common pleas: had the court of K. B. been intended, it would have been described as "wheresoever." 3 M. & S. 166.

In describing an action by original, as having been "then lately commenced," and depending in the K. B.; the word "commenced" may be referred to the court of chancery. 14 East, 539.

The phrase, "the mayor and burgesses in common council assembled," does not necessarily mean a meeting of the whole corporation in common hall assembled, but may be taken after verdict at least, as descriptive of a select part of the corporate body. 4 T. R. 425.

(C 26.) And general words are sufficient, where the certainty lies within the defendant's notice.

And general words are sufficient, where the certainty lies within the defendant's notice.

Or, where the pleader does not know the certainty, or is not privy to it.

An indictment for the murder of a person unknown, where the person murdered is unknown, is good. P. C. Plowd. 85.

So is an indictment for stealing the goods of a person unknown. Ibid.

So, in an action, upon 32 Hen. 8., for letting a farm, of which the party had not been in possession, &c. for a year; it was held a sufficient breach that the defendant let the premises to farm for a term of years, without [\*] saying what term, because the plaintiff was not privy to the lease. R. Partridge v. Strange, Plowd. 87.

So, if the words ascertain the lands which are in demand, it is sufficient to plead a conveyance of them *inter al.* Lut. 1007.

Where circumstances be peculiarly within the knowledge of one's adversary, a summary statement is sufficient. 8 East, 80.

In pleading, where one party throws a charge upon his adversary, he may plead it in general terms, since he cannot be supposed cognizant of the particular nature of it. Hence, in an action for not repairing a private way, which the defendant is bound to repair as owner of an estate, the declaration may state that the defendant was bound by reason of his possession. 3 T. R. 766.

(C 27.) Where they are ascertained by other circumstances.

So, general words are sufficient, where they are ascertained by other circumstances: as in trespass, *quare cistam fregit et diversa vestimenta in cista prædict. existen. cepit* is good, without saying what vestments. R. Al. 9.

*Quare domum fregit et separales claves pro aperiend. ostia domus prædict. cepit.* R. Sal. 643.

*Quare clausum fregit et spinas suas ad valent. so much succidit.* R. 2 Cro. 43b.

So debt for 20 *par cyligar.* without saying of wool, silk, &c. is sufficient; [\*57]

or when a thing is converted to another species, a declaration by the name of that species is good. R. Cro. El. 837.

Or, for so many *par calceorum*. Cro. El. 837.

Or, so many loaves *panis*, without saying of what grain. Cro. El. 837.

If a man prescribes to inclose lands lying together in a common field, if he says that he inclosed, this imports that they did lie together. R. 2 Mod. 104.

(C 28.) And surplusage does not hurt. Vide post, (E 12.)

And surplusage shall not hurt; and therefore if a man in a declaration makes an imperfect mention of a thing, which need not be mentioned, it is not prejudicial: as in a *warrantia chartæ* if the plaintiff says, that he requested the defendant to warrant the land to him, or give him a plea in bar, when the vouchee might plead in abatement as well as in bar, yet it is sufficient; for the request to warrant was sufficient, and the request to give a plea was surplusage, and need not have been mentioned. Hob. 23.

That which in pleading may be rejected as surplusage, will not vitiate; and that is surplusage whose statement, whether in a general or a circumstantial way, is quite unnecessary to the point in question. 4 M. & S. 470.

If he mentions a condition subsequent, and does not allege a certain performance, it shall not hurt; for the whole was surplusage. Pl. Com. 30. a. 32. b.

If a trespass *temp. Eliz.* be alleged to be *contra pacem nup. reginæ et regis nunc*, it is not bad, for *regis nunc* shall be surplusage. R. 2 Cro. 377. 3 Bul. 82.

If by statute, the action is given to the informer only, and the declaration says the action accrued to the king, the poor of the parish, and the informer, it is only surplusage. French v. Wiltshire, M. 11 G. 2. Andr. 67.

[\*] If the plaintiff declares *quod cum ipsi idem def. &c.* for *ipsi* is surplusage. 2 Mod. Ca. 377.

If in an action upon a contract, a breach be assigned, and then a consequence be alleged as resulting from the defendant's omission, it may be rejected as surplusage, since the breach, and therefore the cause of action, is complete without it. 1 T. R. 60.

So, if by the omission of any words, though not repugnant to the precedent words, that which was insensible may be made sensible, they shall be rejected as surplusage. Dub. 1 Sal. 325.

So, if by the words after a *viz.* or *scilicet*, a thing be alleged, impossible, or repugnant to the plaintiff's title, the words shall be rejected as surplusage: as in ejectment, if the entry or ouster be alleged *postea*, viz. such a day, which is a day before the demise. (Vide Sal. 325.)

So in trespass.

So in debt for rent, if a devise of the reversion to the plaintiff be alleged, and that *postea*, viz. such a day, the deviser died, which was a day before the lease. R. Hard. 4.

A material allegation, which is sensible, and consistent in the place where it occurs, and which is not inconsistent with any antecedent matter, cannot be rejected merely because it is inconsistent with a subsequent material averment. 5 East, 244. 1 Smith, 437.

A material allegation, though laid under a *scilicet*, cannot be rejected for the sake of a subsequent material allegation, which is inconsistent with it. 5 East, 244. 1 Smith, 437.

{ More matter of surplusage need not be proved. Allaire v. Ouland, 2 Johns. Cas. 52. Vide Suffrein v. Prindle, Kirby, 112. Fitch v. Hall, Kirby, 18.

[\*58]



Where in a declaration upon a promissory note, payable by instalments, of which two only had become due, it was alleged, among other things, that the defendant had become liable to pay the whole sum, on a general demurrer, the last allegation was rejected as surplusage, and judgment rendered for the instalments alleged to have become due. *Tucker v. Randall*, 2 Mass. Rep. 283.

If an offence punishable at common law, is averred to be *contra formam statuti*, such averment may be rejected as surplusage. *Knowles v. State*, 3 Day, 103. }

(C 29.) Except where it defeats the action.

Yet, if a man, by the allegation of a thing not necessary, shows that he had no cause of action, this, though surplusage, shall hurt: as, in assize, if the plaintiff makes a title, which he need not, and the title is not good, the whole shall abate. Pl. Com. 84. b. 202. b.

So, if a man misrecites a statute in a material place, when it need not have been recited, it is fatal. Pl. Com. 84. b. Vide Action upon Stat. (I).

So, in an action against a disturber, where possession is a sufficient title for the plaintiff, yet if the plaintiff shows a title, and this appears insufficient, the declaration is bad. R. after verdict. M. 9 W. 3. inter Dorne and Cashford, 1 Sal. 363. 365. (Vide 1 Ld. Ray. 266. Comyns's Reports, 44.)

So, in debt for a sum awarded, if the plaintiff shows a bad award. Vide Arbitrament, (I 2.)

So, in partition, if the plaintiff shows that he and the defendant hold both in fee, where the defendant was seized in tail, if this be shown by verdict, the writ shall abate, though it was not necessary to show the defendant's title. R. Cro. El. 760.

(C 30.) So less certainty is wanting for a collateral matter.

So, precise certainty is not necessary for a thing collateral to the action; as, in action upon the case for putting in his close carrion, which died of the murrain, *per quod diversa averia* died; it is sufficient, without saying what or how many beasts; for the action is not for the beasts or the value of them. R. Al. 22.

If the plaintiff alleges *quod quædam pars domus fuit in decasu*, and in consideration that the plaintiff would repair, the defendant *assumpsit*, [\*]&c., he need not say what part of the house was decayed. R. 2 Leo. 53.

(C 31.) And little certainty is wanting for inducement. Vide post, (C 43.—E 10. 18.)

So, exact certainty is not necessary when a thing is alleged only as an inducement; as, if a man claims a thing appurtenant to an office, and not the office itself, it is sufficient to say that it is *antiquum officium*, and it is not necessary to prescribe for it. R. 10 Co. 59. b.

So, if he claims a thing by custom in such a vill, it is sufficient to say *quod est antiqua villa*. 10 Co. 59. b.

If an *assumpsit* be brought on a promise to give so much with his daughter, as he agreed to give with A.; it is sufficient to say he agreed to give so much with A., without showing how or with whom he agreed. Dub. Yel. 17.

So, in an action on the case against a bailiff for not taking sufficient pledges, it is sufficient to say, that he gave him the usual fees, without saying how much he gave; for the demand is not for the fees. Lat. 159.

In an action on the case for diverting a watercourse, if he alleges seisin for life, it is sufficient, without saying for his life or the life of another. R. Cro. El. 112. 3.

In an action for slandering his title, if he says, that he was seised, &c., it is sufficient, without saying of what estate.

In an action on the case, if he recites a recovery in an inferior court, it is sufficient, without showing by what authority. R. Cro. El. 218.

In an action for disturbance of common, it is good, though the precise common be not alleged. R. 2 Cro. 630.

Or, for throwing down his hurdles, it is sufficient to prescribe for erecting in *aperta platea* and taking *diversas denar' summas*, without describing the place, or ascertaining the money more exactly. R. 1 Leo. 108.

Action on the case by a lessee, for disturbing him in his toll, there is no need to say what estate the lessor had when he demised. R. Ow. 109.

In a *formedon* in reverter or remainder, there is no need to show the death of the particular tenant. R. Pl. Com. 32. b.

In debt on a recognizance removed by error out of C. B. into B. R., there is no need to mention its being reversed or affirmed. R. 2 Cro. 98.

A party need not aver any thing in pleading, which his adversary is estopped from denying. 4 M. & S. 125.

An estoppel is only conclusive until the truth appear; a party, therefore, cannot rely on an estoppel, who upon the face of the pleadings has confessed the truth. 1 T. R. 86.

Where a subject comprehends multiplicity of matters, there to avoid prolixity, generality of pleading is allowed. But if there be any thing specific in the subject, though consisting of a number of acts, they must all be enumerated. 1 T. R. 753.

Where a matter consists of a multiplicity of circumstances, insomuch, that to plead it particularly would tend to prolixity, then, for the sake of avoiding [\*]inconvenience, general pleading is allowed. Thus, in the case of a plea of fraud and co-vin. 2 M. & S. 378, 379.

Matters laid by way of aggravation, may be alleged in general terms. 3 Wils. 292.

The declaration in an action for a copyhold fine, may state generally that the defendant was indebted to the plaintiff in such a sum, for a reasonable fine due and payable by him. Dougl. 727.

Bail justifying an entry into a house to search for their principal, may allege generally that they duly became bail, and entered into a recognizance, without stating that the principal was delivered to them. 2 H. B. 120.

An averment that a power was forced to proceed to hostilities, because a treaty was broken, is sufficient. 5 T. R. 607.

A party who pleads a contract, must set it out, if he be a party to the contract. 2 M. & S. 378.

In pleading a non-existing grant, all the forms heretofore observed in pleading deeds, except the profert, must be observed. 10 East, 55.

In an action on a bond conditioned for the payment of an annuity, a plea stating that a memorial of the bond had been enrolled, and after reciting the memorial that it was not a good and sufficient memorial according to the form of the statute; without stating in what particulars it was defective, or alleging that no other memorial had been enrolled, is bad in special demurrer. 1 Mars. 155.

Plea of privilege for a 60th clerk in chancery ought to allege, that defendant is actually attendant on the office; that being the ground of the privilege. 2 Wils. 228.

In actions in inferior courts, every thing essential to give the court jurisdiction, must be averred in the declaration; therefore, that the facts which constitute the gist of the action, happened within the jurisdiction; for example, the consideration of the defendant's promise, as well as the promise itself. An omission in this par-

ticular is not aided by verdict, since no facts need be proved but what are averred. 1 T. R. 151.

Where the judgment of a court, out of the ordinary course of law, and not authorised by a public act of parliament, is pleaded, the nature of its jurisdiction must be shown. 1 T. R. 674.

In a plea, justifying a commitment for obstructing judicial proceedings, the means used must be shown. 1 Taunt. 146.

A plea justifying on the ground of suspicion, must detail the circumstances which induced it. 4 Taunt. 34.

If a coporation, having been dissolved, is incorporated anew by an original charter, it is unnecessary, in making title under the new charter, to mention the fact of the previous corporation. 1 T. R. 589.

Where the question is, whether a mode of election used under a charter of incorporation, is in exclusion of any other; to plead the bare usage is not sufficient, without negating the right of election in any other way. 4 T. R. 810.

In an action for the nonpayment of foreign money, it is necessary to show the value in English money. 5 T. R. 607.

An information, stating a vessel to have been within four leagues of the coast, "having on board Geneva, liable to forfeiture on being imported into this kingdom," is bad for the uncertainty; the Geneva being permitted to be imported, unless under certain restrictions, which ought, therefore, to have been set forth, and the case brought within them. 1 Anst. 52.

[\*](C 32.) So, if it be certain in part, and uncertain for other part, judgment shall be for the plaintiff as to the certain part. (a)

So, if a declaration, in which damages are demanded, be certain for part, and uncertain for the residue; if there be a demurrer to the whole declaration, the plaintiff shall have judgment for that part which is good, and shall release his damages for the other part; as, in an action on the statute of Winton against a hundred on a robbery of his money, and of goods in his custody, and does not say what, if the defendant demurs to the whole, the plaintiff shall have judgment for the money, but not for the goods. R. 2 Sand. 379. Vide post, (Q. 3.—2 V. 3.)

So, in debt on the statute of usury on a corrupt agreement for 40l., and on another for 20l., but does not say that this was corrupt, if the defendant demurs to the whole, the plaintiff shall have judgment for the 40l. R. 2 Cro. 104. 1 Sand. 286.

So, if the defendant pleads to the whole. R. 2 Cro. 104.

So, in debt against an executor on a bond and on simple-contract, it is good for the bond. 2 Cro. 104, 5.

So, in covenant against A. on a covenant in law on a demise by him and B., if the plaintiff assigns several breaches, one that D. was seised, upon which the action ought to be against A. and B., the other, that A. entered upon him; it shall be good for the last. R. 1 Sal. 137. Acc. 2 Sand. 380. Vide post, (2 V. 3.)

In replevin, if the defendant avows for so much rent, part of which is not due, it shall be good for the residue. 1 Sand. 286. 11 Co. 45. b. R. Mo. 281. Vide post, (3 K. 14.)

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(a) Vide post, (E. 36. F. 25.) What plea or replication, bad in part is bad in the whole.

## (C 33.) Declaration must not be double. (b)

So, a declaration ought to be single, for duplicity vitiates it. Hob. 295.

When several matters may be contained in the same declaration or not. Vide Abatement, (G 4.) Action, (G).

{ A count on a cause of action arising after the death of the testator, cannot be joined with a count on a cause of action arising in his lifetime. Myer v. Cole, 12 Johns. Rep. 349.

A count in debt on simple contract, and a count in debt on judgment, may be joined, though the pleas are different. Union Cotton Manufactory v. Lobdell, 13 Johns. Rep. 462.

Counts in trespass *vi et armis*, and in trover, cannot be joined in the same declaration. Cooper v. Bysell, 16 Johns. Rep. 146.

A count on a promise by husband and wife, cannot be joined with a count on a promise by the wife *dum sola*. Edwards v. Davis, 16 Johns. Rep. 281.

So in case by husband and wife, for an injury done to the wife, wherein it was alleged, that the husband had lost the labour and comfort of his wife, and had been put to great expense in her cure, &c. after verdict, the judgment was arrested because injuries were charged for which the husband and wife could not join. Barnes v. Hurd, 11 Mass. Rep. 59. }

As in a *quare impedit* if the plaintiff alleges several presentments in his ancestors, it is double.

Or, a presentment by a feoffor, and another also by the feoffee.

So, in debt on a bond to pay several sums at several days, if the plaintiff declares that the defendant did not pay the said several sums nor any of them, it is double; for nonpayment of any sum is a forfeiture of the bond. Semb. 2 Vent. 198. 1 Rol. 112.

But, if a declaration be with an express *assumpsit* and a *quant. meruit* for the same goods, &c. without saying *alia*, it shall be good. R. after verdict. 1 Sal. 213.

So, a declaration in covenant may assign several breaches.

And duplicity in a declaration is aided by the defendant's plea. R. 2 Vent. 222.

[\*]So, it is aided upon a general demurrer. R. 2 Vent. 222.

Each count of a declaration must be considered as a distinct cause, notwithstanding it be obvious from the averments that the causes are the same. Lofft, 69.

If two counts in a declaration are so much the same, that no evidence could be produced to prove one, which would not prove the other, the court will oblige plaintiff to strike out one; but not if defendant has obtained time to plead. Wilkins v. Perry, T. 8 Geo. 2. B. R. H. 129.

Where there are counts for work and labour generally, and likewise specifying the character in which it was performed, the latter will be struck out on motion. 1 N. R. 289.

Where there is a count on each of several notes of a banker, payable to bearer, the court will not strike them out as superfluous, and put the plaintiff to the inconvenience of proving the consideration on the count for money had and received. 3 Smith, 113.

Where the plaintiff having obtained leave to mend a count in his declaration demurred to, adds new counts which contain no new cause of action, but only

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(b) Vide post, Duplicity in bar, (E. 2.)

vary the manner of stating that which was demurred to, the court will not order them to be struck out. 1 Mars. 609. 6 Taunt. 300.

Subtlety in pleading, in order to ensnare the adverse party, is not permitted. 3 Taunt. 339.

In pleading, a party who is identified with another, is subjected to the same rule by which that other, had he been the party to the suit, would have been bound. 4 M. & S. 120.

Semble, that if an act of parliament provide that such a form of pleading shall be pursued, the courts will allow no deviation from it. 2 M. & S. 379.

### (C 34.) Declaration ought to show a title.

The plaintiff or demandant in his count or declaration ought to entitle himself to the action; for he is to recover by the validity of his own title, and not by the weakness of the defendant's. Van. 8. 58.

As, in a writ of partition between parceners, the plaintiff ought to show, that it was the inheritance of their ancestors and descended to them. D. Cro. El. 64.

So, in partition between joint-tenants. D. Cro. El. 64. Post, (3 F 2.)

Otherwise between tenants in common; for they come in by several titles, and the title of one does not lie in the other's knowledge. R. Cro. El. 65.

So, in a *quem redditum reddit*, the plaintiff must show a title, for which he demands attornment. Cro. El. 64.

In waste, he ought to show a title to the reversion *ex assignatione*, or that he demised to the defendant, &c. Cro. El. 64.

In a *formedon in descender*, he ought to show the distinct gift, by which he claims. Jon. 453.

In remainder, he ought to show all the prior remainders (though expired) upon which his remainder depends. 8 Co. 88. a.

In a writ of escheat, or *cessavit*, he ought to show the tenure. 8 Co. 86. b.

So, in a writ of ward, or of *mesne*. 8 Co. 86. b.

So where plaintiff claims an easement; if it appears in the declaration that it is out of defendant's soil, declaration must set out the title. Vernon v. Goodrich, Str. 5.

< So also, it must be stated, that the cause of action accrued before the commencement of the suit; and if it appear otherwise from the record, the defect is fatal, and is not cured by verdict. Cheetham v. Lewis, 3 Johns. Rep. 42. Vide Waring v. Yates, 10 Johns. Rep. 119. Allaire v. Ouland, 2 Johns. Cas. 52. Stewart v. M'Bride, 1 Serg. & Rawle, 202. Gordon v. Kennedy, 2 Binn. 287. >

### (C 35.) And how seised, &c.

If a man alleges in himself a title to the inheritance or freehold of [\*]lands in possession, he ought regularly to say, *quod fuit seisitus*. Co. L. 17. a. Vide post, (C 43. E. 22.)

If he alleges possession of a term for years, or other chattel real, he shall say *quod possessionatus fuit*. Co. L. 17. a.

So, if he alleges seisin of things manurable, as of lands, tenements, rents, &c., he shall say, *quod fuit seisitus in dominico suo ut de feodo*. Lit. S. 10.

If of things not manurable, as of an advowson, &c., he shall say, *seisitus ut de feodo et jure*, omitting *in dominico suo*. Lit. S. 10.

So, if he alleges seisin of a reversion after an estate for life. Pl. Com. 191. a.

So, if the reversion be after a term for years, he may say, *seisitus ut de feo-*  
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*do et jure*, for he has not the occupation, though he may also say in *dominio suo ut de feodo*; for he has the possession of the freehold, and may have an assize. R. Pl. Com. 191. a.

If he be seised in fee, he shall say, in *dominio suo ut de feodo*; if in tail, *ut de feodo tolliato*.

If for life, *seisitus pro termino vite sue*. Co. L. 42.

If to husband and wife for life and to the heirs of the wife, he shall say, *virtute cujus sunt seisiati sibi et heridibus uxoris, in jure uxoris*. 27 H. 8. 21. b.

But sometimes *seisitus* is used for *possessionatus*, and *e contra*. Co. L. 17. a.

Yet *interessat*. of a term will be bad. R. Sho. 196.

(C 36.) Must show a sufficient estate in him from whom he derives title.

So, if the plaintiff derives an estate from A. he ought to show that A. had such an estate as enabled him to make the estate to the plaintiff; as, if a man entitles himself to a rent by a grant from B., he must show what estate B. had, whereby it may appear that he could grant such rent. Mar. pl. 2.

So, if the defendant avows for rent on a lease for years, and says, that the dean and chapter of W. seised in *jure collegii*, made the lease, it is bad without saying of what estate they are seized. R. Lat. 121. 14.

In debt for rent by an executor on a lease for years by his testator, if he says, that the testator was possessed for years, and demised it to the defendant for a less term, he ought to show the commencement of the testator's term, and that his lessor was seized of such an estate that he could make such lease. R. 1 Brownl. 48. Cont. Sal. 562.

In ejectment, the plaintiff ought to show a title in the lessor and a demise to him. Dy. 366. a.

So, if he avows for rent in replevin on a demise by him, or his testator, to the defendant for years, he ought to show such an estate in the lessor that he could make such demise. R. Sal. 562. (a).

(C 37.) Must plead a conveyance as it operates.

So, if the plaintiff conveys to himself an estate by deed, he ought [\*] to plead the conveyance as it operates in law, and not according to the words of the deed. 1 Vent. 109.

And therefore, if by the deed the words are. I give, grant, release, and confirm, he must not say that such a one *dedit, concessit, relaxavit et confirmavit*; but he ought to say, *quod concessit*, or *quod relaxavit*, &c. as the deed operates. 3 Lev. 292. R. 1 Vent. 78. Ray. 187. 1 Sid. 452. 2 Sand. 96.

So, if a deed operates as a covenant to stand seised, he cannot say, that for affection *concessit*, &c. R. 3 Lev. 292. 4 Mod. 150. Skin. 315.

And though he adds *quæ quidem concessio operavit per viam conventionis stare seisiat*, &c.; it is not good, for this is impertinent. R. 3 Lev. 292.

So, though he concludes *virtute cujus* and of the statute of uses he was seized. Cont. per three J., but Pollexfen acc., and the judgment by the three J. was reversed in B. R. 3 Lev. 292. 2 Vent. 149. 4 Mod. 149.

If there be a feoffment by a joint-tenant to his companion, it ought to be pleaded as a release, not as a feoffment or grant. 4 Mod. 150.

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(a). But now by the stat. 11 Geo. 2. 19. sect. 22. may avow generally.  
[\*64]



If tenant for life grants to him in reversion, it ought to be pleaded as a surrender. 4 Mod. 151.

But if a verdict finds that A. *concessit*, &c., it shall be construed according to the import of the deed. Ibid.

How a bargain and sale shall be pleaded. Vide Bargain and Sale, (B 12.) How a devise, Vide Devise. (P). How a common recovery, Vide post, (3 A 8.)

(C 38.) If he claims by custom or prescription, must prescribe, &c.

So, if the action be founded on a custom or prescription, the plaintiff in his declaration ought to show a good custom or prescription; as, in an action upon the case for not keeping a common bull or boar within the parish, he ought to show a custom or prescription to keep it. R. 4 Mod. 241. Vide Prescription, (H).

Or, at least, that the defendant being rector of the parish ought to keep, in consideration of his tithes. 4 Mod. 241.

If the plaintiff makes title to an office, he ought to prescribe for it. R. 10 Co. 59. b.

So, in an action upon the case for not repairing fences, he ought to show a good prescription to repair; for it is a charge to do a thing against common right. R. 1 Sal. 335, 6.

In an action upon the case for inclosing his common. 1 Sal. 365. Mod. Ca. 19.

But where the plaintiff does not claim the office itself, &c. by prescription, but a thing incident or appurtenant to it, it is sufficient to say, *quod est antiquum officium*. R. 10 Co. 59. b.

So, if he shows that which is tantamount, it is sufficient, though he does not say, *antiquum*; as, if he says, *quod divertit aquæ cursum ab antiquo cursu ad molendinum*, though he does not say *quod est antiquum molendinum*. R. 3 Lev. 133. 3 Mod. 50. Vide Prescription, (H).

So, if the plaintiff alleges that he was seised, and then prescribes, it [\*] is not good, if he does not allege that he was seised in fee; for otherwise he cannot prescribe. R. 2 Mod. 318.

So, it shall not be intended a seisin in fee, after verdict. R. 2 Mod. 318.

So, in real actions founded on a *tort*, there is no occasion to show a title. Semb. 8 Co. 87. b.

So, in an action upon the case for not doing a thing which he ought to do of common right. R. 1 Sal. 22. 360. Mod. Ca. 311.

So, in an action upon the case against a sheriff for entering into his franchise; though he must have it by grant, and the sheriff of common right hath the return and execution of writs. R. Sho. 18.

So, in trespass, the plaintiff need not make a title. R. 2 Bul. 288.

Though it be for a refusal of toll. 2 Bul. 288.

And if he make a title, it will be surplusage, and he may give any other title in evidence. R. 2 Bul. 288.

Yet it is necessary that the plaintiff should show the common or way, &c. to be his own; otherwise it may be the common, &c. of the defendant. R. after verdict. 2 Cro. 158, 9.

(C 39.) When possession is sufficient.

But against a wrong-doer it is sufficient to say generally, that the plaintiff *habere debet* the thing demanded, without making title by grant or prescrip-  
[\*65]

tion; for possession is a sufficient title against him; as, in an action for disturbing him in his toll. R. in B. R. and aff. in Exch. 2 Vent. 292. R. 2 Cro. 43. 123. R. Ow. 109.

So, in an action for digging in his common, it is not necessary to show a title to the common. R. on demurrer in C. B. and aff. in B. R. Trin. 8 W. 3. int. Stroud and Birt, (Vide Comyns's Reports 7.) 4 Mod. 423. R. 1 Vent. 319. R. after verdict. 4 Mod. 175. R. Skin. 213, 621.

So, in an action for stopping his way, it is not necessary to show a title to the way. R. and aff. in Error. 1 Vent. 275. St. John and Moody. And on demurrer int. Blockley and Slater, H. 4 & 5 W. & M. Rot. 1771. R. 3 Lev. 266. Lutw. 120. 2 Lev. 148.

Though the way appears to be in the defendant's close. R. Lutw. 120.

Or, for diverting his watercourse, *quæ ad terram* of the plaintiff *currere consuevit*, it is not necessary to show any other title. R. Cro. Car. 500, 575. R. 3 Lev. 133. 3 Mod. 49. Dub. Sho. 64. R. Carth. 85.

So, if he says, *quæ currere debuit et debet*. R. Skin. 316.

So, in debt upon the st. 2 Ed. 6. 13. it is not necessary to show a title, but only that he is rector or farmer. Vide post, (2 S. 16.)

So, in an action for disturbing him in his seat in a church, it is not necessary to allege repair, or any other ground of enjoyment of his seat, but his possession; for this is sufficient against a wrong-doer. R. 3 Lev. 73.

So, if a man is disturbed by a stranger in his right of sepulture in the chancel, for which he ought to pay the churchwardens 2s., he need not set that out. Waring v. Griffiths, H. 31 G. 2. 1 B. M. 440.

#### (C 40.) When a title shall be shown in replication.

And if the defendant justifies, the plaintiff ought to show a title in [\*]his replication. R. in B. R. Tr. 8 W. 3. int. Stroud and Birt. 4 Mod. 424.

#### (C 41.) When in the bar.

So, in trespass, if the defendant justifies for damage feasant, it is not sufficient to say that he was possessed, without showing by what title. R. on a Special Demurrer. 4 Mod. 419. Vide post, (E. 21, 22.)

So, if the defendant justifies as servant to A. he ought to show what title A. had; and it is not sufficient to say that he was possessed. R. on a Special Demurrer. 4 Mod. 419. 1 Rol. 393, 4.

So, if he justifies by *molliter manus imposuit* in defence of the possession of B. R. Mo. 846. Semb. Lut. 1497.

So, if he justifies damage feasant. R. cont. 2 Mod. 70. 3 Mod. 132. R. acc. Lutw. 1492. R. acc. Where the trespass is *quare clausum fregit*; for the plaintiff pretends title to the soil. Sal. 643.

But where the defendant justifies the taking damage feasant, where trespass is brought for taking goods only, it is sufficient without showing a title to the possession; for this could not be in debate. R. Sal. 643.

And if the plaintiff shows a title, and fails in it, the declaration is bad. Vide ante, (C 29, 39.)

#### (C 42.) But a title in the defendant is sufficient to be alleged generally.

So, if the plaintiff alleges a title in the defendant he need not show it precisely: but it is sufficient in general terms; as in a *scire facias* against the common of a statute who has purchased part of the lauds of the couisor, and  
[\*68.]

sued an extent against the plaintiff, who is the purchaser of the 'other part ; it is sufficient to say that the defendant *perquisivit sibi et heredibus, virtute cujus, &c. fuit possessionatus*, without showing that the deed was enrolled. R. Mar. pl. 97. 108.

**(C 43.) So if it be alleged by way of inducement.**

So, if a title be only conveyance, or inducement to the action, it need not be alleged precisely. Vide ante, (C 31. ) Post, (E 10.)

As, in an action upon the case for a nuisance, if the plaintiff alleges that he was possessed for a term of years, it is sufficient, without showing the commencement of the term ; for the title is only inducement to the action. 2 Mod. 71.

So, if he says that he was possessed, it is sufficient without saying for years. Lut. 120.

So, in covenant, it is sufficient to say, that by indenture he demised, without showing by what title he was seized.

Or, that being possessed for years, he demised, without saying by what title, or for what term possessed. R. Carth. 30.

So, in debt against a sheriff for money levied on a *feri facias* out of B. R. on a judgment in C. B. ; it is sufficient to say that the record was duly removed into B. R., without saying how, by writ of error or otherwise. R. Cro. Car. 539.

**[\*](C 44.) When a declaration shall show a breach.**

The declaration ought to show a breach of the covenant, promise, &c. on which the action is founded.

And if a good breach be not assigned, the defendant may demur generally. Win. Ent. 120. Vide post, (C. 47, 8, 9.)

{ Any defect or inaccuracy in assigning a breach will be aided after verdict, for the court will intend, that damages would not have been given, unless a good breach had been shewn. Thomas v. Rosa, 7 Johns. Rep. 461. }

**(C 45.) How a breach shall be assigned :—In the words of the covenant.**

And it is sufficient, that the breach be assigned in the words of the covenant, promise, &c. As, if a covenant, promise, or condition of an obligation be to show a sufficient record, it is sufficient to say that he did not show a sufficient record, though issue cannot be joined upon it ; for the sufficiency of a record does not lie in the mouth of *lay-gens*, but the defendant on such breach assigned, may say that he showed such a record, and recite it ; and upon demurrer, the court shall judge whether it is sufficient. R. Yel. 39, 40.

If the covenant be not to permit an escape without a warrant from the sheriff, it is sufficient to say that the defendant permitted the escape of A. without a warrant, without alleging how A. was arrested. R. 1 Sid. 30.

Covenant to do any act for further assurance ; it is sufficient to say that he did not make a conveyance on request, without showing any particular conveyance refused ; for the covenant was to do any act, &c. R. Yel. 45.

Covenant that he was seised of an indefeasible estate ; it is sufficient to say that he was not seised of an indefeasible estate, without alleging what estate he was seised of, though the writings of the estate are in the hands of the covenantee. R. Ray. 14, 15. Win. Ent. 134. acc. Vide post, (C. 49.)

In assigning the breach of a covenant for quiet enjoyment, the plaintiff need not set out the title of the person who entered upon him, because he is a stranger to it; it is sufficient to allege generally, that he had a lawful title before, or at the time of conveyance to the plaintiff. 4 T. R. 617. 8 T. R. 278.

*Assumpsit* that *firman faceret*, Ang. would make good such a portion to A. on marriage; breach, *quod non solvit nec aliquo modo firmam fecit*, &c. is sufficient. R. 2 Rol. 738. l. 30.

So, where there are mutual agreements and promises, breach *quod non performavit agreementum suum*, is sufficient. R. 3 Lev. 319. 4 Mod. 188.

Covenant by an apprentice, for not finding victuals *et alia necessaria* in the words of the covenant, is sufficient. R. 3 Mod. 69. 3 Lev. 170.

Breach for want of repairs in the words of the covenant, is sufficient. R. Lut. 329.

Covenant that he will deliver up the house well repaired at the end of the term; breach, that he did not deliver it up, well repaired, is sufficient; for if the defendant pleads that he delivered it up, well repaired, the plaintiff shall assign a particular breach. R. 2 Cro. 170, 171.

Covenant to permit the removal of trees; breach, *quod non permisit sed obtruxit et obstupavit*, is sufficient. R. Sho. 252.

[\*]Breach, that he did not surrender a copyhold, is sufficient, though he does not show a court held. R. 2 Cro. 102.

In debt on a bond, that the defendant will not waste goods, and the defendant pleads, that he did not waste; if the plaintiff replies, that he did waste goods to the value of 100*l.* without saying what goods, it is sufficient. R. 1 Lev. 94.

Debt on an obligation with a condition to make a good title to such an estate, after performance pleaded, the plaintiff may assign a breach *quod non monstravit bonum titulum*, &c. R. Carth. 125.

Covenant to pay so much to A. to the use of B.; breach, that he did not pay to A. for the use of B., is good. R. 2 Mod. 138.

If the promise or covenant be in the disjunctive, the breach ought to be assigned, that he did not do the one, nor the other. R. 1 Sid. 440. 1 Vent. 64.

So, if a covenant be that A., his executors, and assigns shall repair, &c.; breach for not repairing ought to be, that A., his executors, or assigns, *non reparaverunt*; for, if it be assigned in the conjunctive, it will be bad on a general demurrer. R. Cro. El. 348.

But where the act is to be done to A., or his assigns, it is sufficient to say, that he did not do it to A.; for an assignment shall not be intended, if it be not shown on the other side. R. 1 Sal. 139.

So, in covenant against the original lessee, that he did not perform, is sufficient, without saying, "nor his assigns." *Qui facit per alium, facit per se*; therefore if his assigns have done it, the breach is false. Gyse v. Ellis, M. 6 G. Str. 228.

So, in covenant to pay, or cause to be paid, to them or one of them; the breach in general that he did not pay, is sufficient. Aleberry v. Walby, M. 6 G. Str. 229.

If a covenant be to deliver corn into a barge to be brought by the plaintiff, *super vel ante* 1 M.; breach, that he did not deliver *super* 1 M., is sufficient, without saying *super vel ante*; for the delivery was to be into the barge brought by the plaintiff, and therefore could not bind the plaintiff to any time before the last day. R. 1 Sal. 140. (Vide Comyns's Reports, 89. 1 L. Ray. 620.)

In debt on a bye law, for not paying 2*s.* per annum, quarterly, the breach need not assign the days of payment. Innholders' case, M. 24 G. 2. 1 Wils. 281.

If the breach of a general covenant be assigned in the words of a covenant, fol-

lowed by a specification of the acts infringing it, the plaintiff is tied up to prove the acts specified, and cannot give evidence, which, though it amounts to a breach of the covenant, is not a breach of the particular kind. 3 T. R. 307.

(C 46.) According to the intent of the covenant, &c.

So, if a breach be assigned in words, which contain the sense and substance of the covenant, &c., though they are not the precise words of the covenant, it is sufficient; as, if a promise be that *warrantizaret* the debt of A., and the plaintiff assigns a breach *quod non solvit*, &c., it is well; for that is the intent of the promise. R. 1 Sid. 178. R. 2 Rol. 738. l. 15.

{ Vide *Hopkins v. Young*, 11 Mass. Rep. 302. *Smith v. Allen*, 5 Day, 337. *Bacon v. Page*, 1 Conn. Rep. 404.

A breach need not be assigned in the very words of the covenant; it is sufficient to aver what is substantially a breach. *Fletcher v. Peck*, 4 Cranch, 87. }

So, if a policy insures a ship against the barrety of the master, and the breach is assigned, that the ship was lost by the fraud and neglect of the master, it is well assigned. *Knight v. Cambridge*, P. 10 G. 2 Ld. Raym. 1349. Str. 581.

[\*] If a covenant be to show a sufficient record, and he says that he did not show any record. Adm. Yel. 40.

If the covenant be that the plaintiff and his wife shall enjoy; breach, that the plaintiff was ousted, is sufficient; for the husband had the entire possession. R. 2 Cro. 383.

Lease from A. and B. his wife, to C., for 7, 14, or 21 years, at C.'s election, who covenants to pay A. and B., their executors, &c. said rent during said term; C. enters and continues in possession; A. dies; B. marries D.; rent is in arrear; D. and B. bring action of covenant in the first seven years; and assign for breach, that C. has not paid to D. and B.; the breach is well assigned. *Ferguson v. Cornish*, T. 33 & 34 G. 2. 2 B. M. 1032.

If an *assumpsit* be to make good a portion of 500*l.*, if the plaintiff says that the defendant did not pay, it is sufficient. R. Jones, 228, 9.

If an award be that A. shall pay, or procure a stranger to be bound for the payment, and the defendant pleads performance; it is sufficient for the plaintiff to assign a breach, that A. did not pay, without adding *nec procuravit* the stranger to be bound for it; for the award is void as to that. Dan. 557.

If a promise be to deliver goods *super vel ante* 19th January; breach, that he did not deliver *super* 19 January, is good; for delivery at a day precedent, will not be good without notice; at least, after verdict it is good. R. inter Harman and Ouden, B. R. Tr. 12. W. 3. (Vide 1 Sal. 140. Comyns's Reports, 89. 1 Ld. Ray. 620.) Cont. where an award was to pay money *ad vel ante*. R. 3 Lev. 293.

(C 47.) When it is not well assigned:—If it does not comprehend the effect of the covenant.

But if a breach assigned be not in the words of the covenant, but shorter, or larger than the covenant, &c., it is bad; as, a covenant for enjoyment without lawful disturbance; breach, that he was disturbed, is bad; for it should be, that he was *legitimo modo* disturbed, in the precise words of the covenant, or otherwise he should show by whom he was disturbed and how. R. Cro. El. 914. Yel. 30. Vide post, (C 49.)

Promise to deliver a horse in good plight; breach, that he did not deliver it, is bad. R. 1 Vent. 64.

Covenant to repair a fence except *in parte occidentali*; breach, that he



did not repair, and does not say that the want of repair was in other than the west side, and therefore bad. R. 2 Jon. 125.

Promise to pay a bill of costs, when taxed by two attornies to be chosen between the parties; breach, that he did not produce any bill, is not good. R. 2 Sand. 107.

Covenant to pay so much per ton; breach, that he has not paid for so many tons and one hogshead, is bad; for it was not *sec ratam*, and therefore nonpayment for the hogshead is not within the covenant. R. 2 Lev. 124.

Covenant *quod super requisitionem manuteneat* any action in his name; it is not good, if he shows an action brought in his name which abated, if he does not say that it was upon request. R. 1 Leo. 169.

Covenant to pay 5s. per day, after notice that he would not act any more, proviso, that no notice shall be given but in an acting week; breach, that he gave notice *sec. formam articulorum*, is not sufficient, [\*]but he ought to say expressly that it was in an acting week. R. Sal. 574. For the proviso is part of the covenant itself.

In *assumpsit* to deliver goods, or pay 20l.; breach, that he did not deliver, is not sufficient without saying, "nor paid 20l." R. Hard. 320.

So, if a breach be in these words, that he was not seised of a well, when the demise was of a messuage with liberty to have water there, and he covenanted that he was seised of the premises; but he ought to say, that the lessor had not power to grant such liberty. R. Lut. 608.

So, if a breach be in the words of the covenant, &c. where the words are in part void, or surplusage, and do not contain the effect of the covenant, it is bad; as, if an award be, that A. and a stranger shall give a bond; breach, that A. and the stranger did not give it, will be bad; for if A. only gives it, it is sufficient; the award being void as to the stranger. Dan. 557.

If A. assigns his office, and the fees belonging to it, and engages that B., to whom he assigned, shall receive them; it is not a good breach that B. did not receive them; but he ought to show that A. prevented him. Per two J. 4 Mod. 44.

If the breach does not show a disturbance after the plaintiff's title, it is bad; as, on a covenant to enjoy without the interruption of B., if the plaintiff says, that he entered 3d Nov.; and that B. had a lease, upon which he entered 1st Oct., it is not good. R. Al. 19.

### (C 48.) If it be not certain.

So, if a breach is not certain and express, it is bad.

If a covenant be, that an apprentice shall not waste goods; breach, that he wasted divers goods, is not good without saying what. R. 1 Lev. 94.

If the breach is, that the messuage was not repaired, and does not say in what the defect was. Bendl. pl. 110. Skin. 344.

Yet, a general breach is sufficient in covenant; and therefore that he sold to A. and others, at several times between such a day and such a day, is sufficient. R. 1 Sal. 139.

If a covenant be, that the plaintiff may enter and enjoy without let or demand of the defendant; breach, that he did not enter and enjoy by reason of the let or demand of the defendant, is bad. Semb. Hard. 132.

If a covenant be to find meat, drink, and other necessaries, and the breach be in the same words, without saying what necessaries, it is bad. R. 2 Cro. 486.

[\*70]



If a breach be, *non performavit agreeamentum*, without saying in what particular, it is bad. Skin. 344.

But a breach badly assigned shall be aided after a verdict, which finds for the plaintiff. R. 2 Jon. 125. R. Skin. 344.

So, in covenant, if one breach be well assigned and another ill, the plaintiff on an entire demurrer to the whole declaration shall have judgment for the breach well assigned, and shall be barred for the residue. 2 Sand. 380. Vide ante, (C 32.)

**(C 49.)** If it does not show an interruption by title.

So, a breach assigned in the words of the covenant, &c. where the [\*]words do not import any such breach, is not good; as if the lessor covenants that the lessee shall enjoy during his term; breach, *quod non gavisus fuit* is not sufficient, for the covenant is not broke but by disturbance by a lawful title. R. Vau. 121. R. Hob. 35. Win. Ent. 120. Vide post, (E 25, 26.)

So, in covenant for quiet enjoyment of twenty tons of copperas; breach, *quod non potuit gaudere*, &c. is not good, without showing a lawful disturbance. R. Cro. El. 914. Yel. 30.

So, in *assumpsit* for quiet enjoyment; breach, that he did not quietly enjoy, is not good. R. cont. Dy. 328. a. R. acc. 2 Cro. 425.

In *assumpsit* to enjoy without disturbance; breach, that a stranger made a distress upon him, is not good, without saying that the distress was upon an elder charge. R. 2 Cro. 444.

So, in debt on a bond for quiet enjoyment; breach, that he was ousted, without saying by an elder title, is bad. R. Dy. 328. a. in Marg. R. Cro. Car. 5.

A condition, or covenant, that the lessee shall not oust the tenants inhabiting within the manor, of their tenements, if they do duty according to the custom; breach, that he ousted B., a tenant inhabiting his teneiment parcel of the manor, is not good; for perhaps B. was only a tenant at will. R. 1 Leo. 246.

So, in covenant, if the plaintiff for breach assigns that A. *habens legal titulum* entered, it is not good, without showing what title A. had. R. 2 Sand. 180. 1 Sid. 466. R. 3 Mod. 135. R. cont. 2 Lev. 31. R. acc. 1 Lev. 301. 1 Mod. 294.

So, if A. as attorney to another, makes a demise, and covenants that the lessee shall enjoy; if the lessee in covenant shows a recovery against him in trespass, without showing the title, it is not good. R. per two J. 2 Vent. 62.

So, if in debt on a bond for enjoyment of land without eviction; the defendant pleads conditions performed, and the plaintiff assigns for breach a recovery against him; it is not good without saying it was by an elder title. R. 2 Cro. 315. R. 1 Lev. 83.

And though the defendant rejoins that the recovery was by *corin*, and it be found for the plaintiff; yet the breach is not aided by the verdict. R. and judgment cont. reversed. 2 Cro. 315.

So, if it be for the enjoyment of a way, till A. is of full age, and he says that A. obstructed him, without saying by title. R. 3 Lev. 305.

So in covenant for enjoying without the interruption of B. and all claiming under him, and he says that he was interrupted by A., who claims under B. without saying how, or by what title. R. cont. and afterwards reversed by all the just. and barons. Cro. El. 823.

In covenant to save harmless from arrears of rent ; breach, that he did not pay, is not sufficient, without damnification. Skin. 397.

But the breach is well assigned, that A. *habens lagal. titulum virtute dimiss. fact.* before the covenant to the plaintiff, though it does not show what title A. had. R. 3 Lev. 325.

If there are several covenants, one, that A. shall well serve, the other, that if he embezzles, &c. ; B. upon notice shall make satisfaction ; if the breach be, that A. embezzled, without saying that he gave notice, it will be a good breach on the first covenant. R. Cro. El. 831.

So, where the matter lies properly in the knowledge of the covenantor, [\*] a breach in the words of the covenant is sufficient ; as, if a lessor covenants that he has full power to make the demise ; it is sufficient to say, that he had not power, without showing in whom the estate was ; for this lies more in the notice of the lessor. R. 9 Co. 61. a. Cont. Win. Ent. 122. Vide ante, (C 45.)

So, where the covenant is against interruption by the covenantor himself ; breach, that he himself entered, &c., is sufficient without shewing by what title. R. 2 Cro. 383. R. Cro. El. 544.

So, if a covenant or promise goes only to the possession, eviction is sufficient, without showing the title. R. 2 Lev. 194. R. Dy. 328. a. Vide ibid. in Marg. Semb. cont. per two J. 2 Vent. 62.

So, if a covenant be against the act of a particular person, interruption is sufficient, without saying by what title. R. Cro. El. 213. Adm. 2 Vent. 62. R. 2 Lev. 37.

### (C 50.) Averment in a declaration :—When necessary.

The plaintiff in his declaration ought to aver all that is necessary for the maintenance of his action.

If a declaration in assault and battery begins with *quod cum*, it is bad, for want of averment, (in B. R. not in C. B., where they proceed by original) and judgment shall be arrested. Smith v. Reynolds, T. 10 & 11 G. 2. Andr. 21.

Facts, for example, time and place, may always be alleged under a *videlicet* ; since if it be material that they should have happened in the precise manner charged, the stating of them under a *videlicet* will not let in a latitude in the proof. 1 T. R. 63. Id. 68.

But the plaintiff need not aver his count by *hoc parat. est verificare*. Pl. Com. 342. a. Co. L. 303. Vide post, (E 33.)

{ In an action against executors for a legacy, the plaintiff must allege and prove, that at the commencement of the suit, they had sufficient assets to pay debts and legacies. Dewitt v. Schoonmaker, 2 Johns. Rep. 243.

In declaring on a specialty, it must be averred, that it was sealed. Van Santwood v. Sandford, 12 Johns. Rep. 197. Vide Macomb v. Thompson, 14 Johns. Rep. 207.

The averment of an immaterial fact, is unnecessary. Suffrein v. Prindle, Kirby, 112. Fitch v. Hall, Kirby, 18.

But an averment in an indictment if not impertinent, must be proved, though the prosecution might be sustained without it. United States v. Porter, 3 Day, 283.

The averment of a fact must be positive, and not by way of recital. Thus an averment in these words, "Whereas the said defendant *having*," &c. was held to be bad. Harrington v. M'Farland, Cam. & Nor. 408. {

[\*72]

(C 51.) Performance when it shall be averred :—Condition precedent.

And therefore in all cases where the estate or interest commences on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff, the defendant, or any other, the plaintiff ought in his count to aver performance. R. 7 Co. 10. a. *Ughtred.* { *Zerger v. Sailer*, 6 Binn. 24. }

As, if a man grants an annuity to another, when he is promoted to such a benefice, &c.; the plaintiff in annuity ought to aver, that he is promoted, &c. Pl. Com. 25. b.

If a man devises, that, if his goods are not sufficient to pay his debts, his lands shall be sold; he, who avows under the vendee, ought to aver precisely that the personal estate was not sufficient. R. Jon. 328.

If a man promises to surrender land on payment of so much money, in *assumpsit* the plaintiff ought to allege payment, or a tender and refusal. R. Cro. El. 389.

If in consideration that A. at the special request of B. would execute a general release, (to bear date before this agreement,) B. will pay, &c. A must aver, that he gave or tendered the release. *Collins v. Gibbs*, M. 33 G. 2. 2 B. M. 899.

So, if a man promises as a surety or *fidejussor* for another, in *assumpsit* against him for nonperformance of the promise, the plaintiff ought to aver, that he for whom he was surety has not performed. R. 2 Cro. 500.

[\*] If bail be bound in a recognizance that the defendant shall appear in eight days after warning, and if he be condemned shall render himself or pay, &c.; the plaintiff ought to show that he was warned; for it is a condition precedent. R. 2 Cro. 46.

If the defendant justifies an arrest 10 Oct. *virtute warranti* of the quarter sessions 9 Oct.; he ought to aver, that the sessions continued till the arrest. 2 Lev. 229.

Tender of stock must be on the very day, notwithstanding the custom of the alley to allow a day or two. Per Pratt C. J. *Bullock v. Noke*, H. 10 G. Str. 579. N. B. King C. J. in a like case left it to the jury, who found it a good tender.

Tender of stock must be at the last part of the day that it can be accepted. *Duke of Rutland v. Hodgson*, T. 13 G. Str. 777.

The buyer of stock must be called at the books, to make it a good tender. *Thornton v. Moulton*, M. 9 G. Str. 533.

If stock and dividends are to be transferred, the declaration must show what the dividends were, and that they were all tendered. *Bowles v. Bridges*, P. 2 G. 2. Str. 832.

On a contract for sale of stock, tender of the stock by a third person appointed by the seller is not sufficient, for the purchaser is not obliged to accept it from a third person. *Rhodes v. Lovit*, in Sc. H. 1720. Bunb. 70. Vide *Merrit v. Rane*. Str. 458. where a third person attending by purchaser's appointment to pay for and accept stock was held good.

If tender of stock was to have been on a non-transfer day, it must be shown, that leave to transfer was actually obtained. *Clark v. Tyson*, H. 8 G. Str. 504.

(C 52.) The cause or consideration of the duty demanded.

So, if the thing demanded is granted for such a cause or consideration, this ought to be averred to have been performed; for it is in the nature of a condition precedent: as, if I promise 20s. to A. for his going with me to Rome, he ought to aver his going to Rome; for upon that the duty commences. 7 Co. 10. b.

Or, for his service for a year, he ought to aver his service. Hob. 106.

Or in consideration of his forbearance for a week, he ought to aver his forbearance. R. Cro. El. 272.

So the cause or consideration of a patent, if it be executory or the suggestion of the party ought to be averred. Vide post, (C 62, 3, 4, 5.)

{ if two valid considerations be alleged as the ground of a special agreement, in writing, both must be proved as laid, though they are expressed in the instrument by the words "for value received." Lansing v. M'Killip, 3 Caines' Rep. 286.

In declaring on a note not negotiable, and expressed to be for *value received*, it is sufficient to state, that it was given for value received, without averring a special consideration; but if the plaintiff alleges a special consideration, he is bound to prove it as laid. Jerome v. Whitney, 7 Johns. Rep. 321. Vide Lansing v. M'Killip, *ubi supra*.

In an action by the assignee of a promissory note, the averment that the assignment was for value received, is immaterial and need not be proved. Wilson v. Codman's Exr. 3 Cranch, 193.

The whole consideration of a contract must be stated, and if a part of the consideration, or of a consideration consisting of several things, be omitted, the omission is fatal. Brooks v. Lowrie, 1 Nott & M'Cord, 342. }

(C 53.) Though there are mutual agreements, if the thing to be done for such a consideration is by agreement to be done at a day subsequent to the performance of the condition.

So, where there are mutual agreements, and the one agrees to give a hawk at such a day, and the other agrees for the hawk to deliver a horse at a subsequent day: in an action for the horse, the delivery of the hawk must be averred; for that was the consideration of the promise. Lut. 251. 1 Salk. 171.

If A. agrees to build a house, and B. agrees to pay 10*l.* *pro labore suo*, and there are mutual promises, in an action by A. for the money, he must aver performance of the work. R. per two J. Twisd. cont. 2 Sand. 351. 2 Lev. 23.

[\*] So, if A. agrees to assign a lease to B., and B. agrees to pay *proinde* 250*l.*, and there are mutual promises, if A. sues for the 250*l.*, he must aver an assignment of the lease. R. Cont. Ellis Dub. 2 Mod. 34. This resolution denied to be law. Sal. 172.

If A. agrees to pay 10*l.* to B. within six months, B. transferring so much stock to him, and B. gives a note to A. to transfer so much stock to him, paying 10*l.*; if B. sues for the 10*l.* he must aver that he has transferred, or offered to do it; and if A. sues for not transferring he ought to aver, and prove payment or a tender of the 10*l.*, for they are conditions precedent, though there are mutual promises. Per Holt. 1 Sal. 112.

So, if mutual agreements are to be performed reciprocally on a precedent act by the other: as, if A. covenants to transfer stock to B. on payment of so much, and B. covenants to accept such transfer, and then to pay: in covenant, &c. for nonpayment, A. ought to aver a transfer or a tender. R. per C. B. But reversed per three J. in B. R. But affirmed in parliament. 2 Mod. Ca. 68. 381.

So, if there are mutual agreements, and one agrees to do his part at an indefinite time, and the other in consideration thereof to pay, &c. R. 2 Mod. Ca. 40.

[\*74]

(C 54.) When performance need not be averred:—Where there are mutual agreements.

But where there are mutual promises, generally, performance need not be averred. 7 Co. 11. a. Adm. Lut. 250. R. Mar. pl. 114. R. Lut. 224. Cro. El. 889. { Close v. Miller, 10 Johns. Rep. 90. Whitall v. Morse, 5 Serg. & Rawle, 358. }

As, if a man promises to deliver a cow, and the other promises payment of 20l.; in an action for the money, the delivery of the cow need not be averred. R. Hob. 88. Agreed per Holt. Lut. 250. Dan. 72.

{ Where two acts are to be done at the same time, as where one agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, in an action for the non-delivery, the plaintiff must aver a readiness to pay on his part, whether the other party was at the place, ready to deliver or not. Porter v. Rose, 12 Johns. Rep. 209. }

A covenant to pay upon transferring stock is mutual. Wyvil v. Stapleton, M. 11 G. Str. 615. Dawson v. Myer, T. 12 G. Str. 712.

If a man promises to deliver so many tons of iron, and the other promises payment, the plaintiff need not aver the delivery of the iron. R. Yel. 133.

If there be an agreement that A. shall pay so much on such a day, if B. will promise to maintain an infant for so many years, and there are mutual promises thereon; in *assumpsit* for the money, B. need not aver that he promised, &c. R. Lut. 223, 4.

If A. promises to take an apprentice, and B., in consideration thereof, to pay so much. R. 1 Lev. 87.

Or, to provide soldiers to be transported, and B. to provide ships to transport them. R. Sti. 186, 7. 2 Mod. 75.

If A. covenants to account, and B. to allow on such account such a thing. R. 2 Mod. 76.

So, where there are mutual covenants, the plaintiff need not allege in covenant, that he has performed the covenants on his part. R. 1 Rol. 414. l. 40, 55.

So, where the plaintiff alleges an agreement and mutual promises to perform, performance by the plaintiff need not be alleged, though they ought to be performed. R. Hard. 103.

[\*] If A., in consideration that B. undertook not to sue a bail bond against him, and to give him the benefit of an outlawry, assumes to pay B. 400l. Averment, that A. had the benefit of the outlawry without saying that he did not sue the bail bond, is sufficient. R. 1 Lev. 20.

And in case of mutual promises, the plaintiff need not allege performance of all on his part to be performed. Adm. Lut. 223, 4.

If plaintiff declares, that in consideration he had agreed to deliver cloth to defendant, defendant agreed to pay him money in case A.'s horse beat B.'s which he avers he did, he need not aver delivery of the cloth; but if it is, that in consideration plaintiff would deliver cloth, defendant would pay, then the delivery must be averred. Martindale v. Fisher, P. 18 G. 2. Wils. 88.

< So where the power to perform a covenant on the part of the plaintiff, depends on an act previously to be done by the defendant, he need not aver a tender and refusal, but an averment of a readiness to perform, is sufficient. West v. Emmons, 5 Johns. Rep. 179.

In *assumpsit* on a promise to pay money when collected, the reception of the money must be averred and proved. Dodge v. Coddington, 3 Johns. Rep. 146. >



(C 55.) Though one thing is to be done in consideration of another, if it be agreed to be done at a day precedent.

So, where there are mutual agreements, and the thing on the one part is in consideration of a thing on the other part, but to be performed at a day before the thing on the other part, there such consideration need not be averred to be performed. Lut. 250. 1 Sal. 171.

As, if a man agrees to serve another in war, and the other agrees to pay him so much for his services at a day before the war began, an action lies for the money without an averment of the service. R. Lut. 250.

If a man, in consideration of 10*l.* to be paid after a new lease granted, promises to obtain a new lease ; in *assumpsit* for not obtaining it, the plaintiff need not allege that he is ready to pay the 10*l.* R. Cro. El. 249.

If a man covenants to assure land to A. for the consideration after mentioned, and A. covenants for the consideration aforesaid to pay so much ; in covenant for the money, it is not necessary to aver, that he has assured. R. 1 Rol. 415. l. 5.

So, in debt on a bond for performing an award, if the award be, that one shall pay 10*l.*, and the other, in consideration thereof, shall release, and a breach is assigned for not releasing, there is no need to aver payment, for he has a mutual remedy. R. 1 Rol. 415. l. 20. Cro. Car. 384.

In debt on a bond to pay 50*l.* on marriage, or on first February next, proviso, that the plaintiff justifies the truth of the declaration under his hand and seal, given to the defendant of the same date with the bond ; plaintiff need not aver that he has justified the truth, &c. Dub. Hard. 9.

(C 56.) Where there are mutual remedies.

So, where there are mutual remedies : as, if a man promises to deliver metal made into pewter *capiendo inde* so much as he reasonably deserves, in *assumpsit* for not delivering it, there is no need to aver, that he tendered so much as he deserved ; for it is not a condition precedent, and the defendant may have debt for what he deserves, or may detain at his election, and then it will come on his part. R. 1 Rol. 466. l. 40.

If A. covenants to repair a house before Michaelmas, and B. covenants [\*]that, *ab et post tempus quale* A. *repararet*, he will repair ; in covenant against B. for not repairing after Michaelmas, it is not necessary to aver that A. repaired before ; for *post tempus*, &c. does not refer to the repair, but to the time when the lien upon B. to repair begins, and covenant lies against A. if he did not repair before Michaelmas. R. 1 Rol. 416. l. 40.

If articles be, that A. gives to B. 500*l.* for his land ; in debt for the 500*l.* there is no need to aver that he has conveyed the land ; for there is a mutual remedy when both have sealed the deed. R. 1 Sand. 320. R. Lut. 496.

So, if A. covenants to transfer stock to B. *super vel ante* 21<sup>st</sup> September, and B. covenants to pay so much to A. *super vel ante* the same day. R. 2 Mod. Cas. 105, 6. 294.

On an indenture between two parties, there are mutual remedies ; on a deed-poll there is not. Lock v. Wright, T. 9 G. Str. 569.

(C 57.) Matter *ex post facto*, which defeats an estate or interest.

So, where an estate or interest passes or vests immediately, and is to be [\*76]



defeated by a condition subsequent, for matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff, or the defendant, or any other; performance of that matter need not to be averred: as, if a man grants an annuity for the maintainance of six soldiers for the defence of a castle, the plaintiff in annuity need not aver, that he has maintained, &c. R. 7 Co. 10. a.

If a grant be of an annuity to A. till he be advanced to a benefice; A. in annuity need not say that he is not yet advanced. 7 Co. 10. a. b. Pl. Com. 25. b. 30. a. 32. b.

(C 58.) Performance how alleged:—According to the intent.  
Vide Condition, (G 12.)

And he ought to aver performance of the intent of the covenant, &c.; for it is not sufficient to pursue the words, if the intent be not also performed: as, on a promise in consideration that he would cause A. to come to be bound, to the defendant for 20*l.*; it is not sufficient to aver that he caused A. to come to be bound, but he ought to say, that he was bound. R. Yel. 50.

On a promise to drain lands, *ita quod sint siccae in extremitate hiemis, viz. aliquo tempore inter All Saints and Candlemas*, it is not sufficient to say that *fuerunt siccae in extremitate hiemis, viz. aliquo tempore* between those feasts, but it should be said that *fuerunt siccae* for all that time, or that they did not overflow *aliquo tempore*, &c., for that was the import of the words. R. 2 Rol. 246. l. 30.

(C 59.) Exact performance. Vide Condition, (G 11.)

And he ought to show an exact performance; as, on a promise in consideration that he would procure 20*l.* for one year, it is not sufficient to say that he procured 10*l.* the 23d of April, and 10*l.* the 23d of June; for he ought to procure the whole for a whole year. R. Yel. 87.

So, if it be to procure 20*l.* in gold; 10 guineas, and the residue in silver, is not sufficient. Ibid.

So, on a promise to an attorney, in consideration that he will acknowledge satisfaction on record, &c.; it is not sufficient to say that he [\*]*tanquam attorney*. acknowledged satisfaction; for perhaps his warrant was revoked. R. 1 Rol. 366.

So, on a promise in consideration of a lease of lands for 10*l.* *per ann.*; it is not sufficient to say that he made a lease of the said land, without saying that it was for 10*l.* *per ann.* R. 3 Bul. 35.

On a promise to pay before the next journey by the plaintiff to London; it is not sufficient to say that *incepit iter* such a day, but it ought to be said that he made his next journey, &c. R. Yel. 176.

In consideration that he would repair on request; it is not sufficient to say *reparavit*, if he does not add, on request. R. 2 Leo. 53.

So, on a note, "I promise to pay A. on his transferring," it is not enough that B., his surviving partner, tenders. Fowler v. Samwell, M. 12 G. Str. 653.

(C 60.) Must show to the court, that it is well performed.

And he ought to show performance with such certainty, that the court may judge that the intent of the covenant is performed; as, on a promise in consideration that he would procure a sufficient man to be bound; it is not enough to say that he procured a sufficient man; but he ought to show

of what sufficiency he was, whereby the court may judge whether he was sufficient or not. R. Yel. 49. Dan. 71.

So, on a promise in consideration that he would execute an indenture, &c. *per quam barganiz*. it is not sufficient to say that he executed the indenture aforesaid, but he ought to show that he executed such an indenture, *per quam barganiz*. &c. R. Yel. 111.

But if the consideration was to execute such an indenture in certain, "that he executed the indenture aforesaid," is sufficient. Yel. 111.

If a promise be to deliver 15 *todas lanæ*, to be chosen by A. out of 17; in *assumpsit* for not delivering them, he ought to show that A. chose 15 *todas*; for the election is the first act. R. after verdict. Yel. 76.

On an *assumpsit* in consideration that he would abate 10*l.* part of a debt, it is not sufficient to say that he did abate, without showing how. R. Cro. El. 477.

In consideration to acquit A. of a debt, it is not sufficient to say that he acquitted him, without showing how. R. 2 Cro. 503.

If a declaration recites an agreement that A. would lease for years to B., but that B. refused to seal the indenture, because a covenant was inserted for repair generally, and that the defendant, in consideration that B. would seal, and the plaintiff would give a bond for the performance of the covenants, assumed to repair during the term; it is not sufficient to say that B. sealed, without showing a demise was made. R. Yel. 18.

If a devise be, that land shall be sold, if his goods are not sufficient to pay his debts; in avowry by the vendee, he ought to show how much the debts, and how much the goods are, so that the court may judge whether the condition precedent to the devise be performed. R. Jon. 328.

If the consideration of an *assumpsit* be that he shall give a bond with sureties; it is not sufficient to say that he tendered a bond, if he does not say in what sum and what sureties. R. Hob. 69.

But to allege performance in words, which in evidence import it, is sufficient; as, if a promise be to receive A. and B. *ut hospites*, and to [\*]find necessities; if he alleges that he received them and found necessities, it is sufficient, without saying, *ut hospites*. R. 1 Sal. 25.

If the consideration is to make sails worth 45*l.*; that he made the said sails is sufficient. Wallis v. Scott, E. 4 G. Str. 88.

If a promise be to discharge from arrest; if he alleges *quod exoneravit*, it is sufficient; for he need not say how, as in the discharge of a bond, or rent. R. Cro. El. 914.

If a promise be in consideration that he at the request of the plaintiff, would procure a note of B.; it is sufficient to say that he procured a note, without saying at his request; for a subsequent request was not intended. R. 2 Vent. 75.

But after verdict it shall be aided, if the plaintiff alleges a performance, but does not show how. R. 2 Jon. 125.

(C 61.) But it is sufficient to show a performance in general terms.

But if the plaintiff shows a certain and exact performance, it is sufficient in general terms, without alleging particularly how he performed; as, on a promise to pay *quant. dispenderet* for the officers of the army in such a suit; an averment, that he spent so much, is sufficient, without showing for what officers in particular. R. Ray. 9.

{ So in an action for the breach of covenants in an indenture of apprenticeship, a general averment, "that the plaintiff had kept and performed all the covenants in said indenture by him to be performed," is not only sufficient, but is the best form of pleading; the distinction being, that where the act to be done, involves a question of law, the *quo modo* must be pointed out, but where it is a mere matter of fact, a general averment of performance is the most proper. *Wright v. Tuttle*, 4 Day, 313. }

On a promise in consideration that *renunciaret* the executorship, an averment that *renunciavit*, is sufficient, without saying before whom or how. Ray. 400.

That *conaret maritagium*; averment, that *conatus fuit* and it took effect, is sufficient, without saying how he endeavoured. R. Ray. 400. Dan. 72. Mo. 595.

That he would forbear a suit; averment, that he did forbear it, is sufficient, without saying in what court. R. Ray. 203.

That *monstraret compot.*; averment, *monstravit quoddam compot.*, &c. without saying *compot. prædict.*, is sufficient. R. Ray. 204.

That he would marry A. on request; averment, that he married A. is sufficient, without more. R. 2 Cro. 404. Dan. 73.

That he would pay as much as was agreed to be paid to A.; it is sufficient to say, that so much was agreed to be paid to A., without saying by whom. Dub. Yel. 17.

That he would forbear a suit; it is sufficient to say that he did forbear generally, without saying *hucusque*. R. 2 Mod. 24.

Or, that he forbore from the time of the promise *hucusq.* is sufficient, though to be intended a total forbearance. R. 2 Mod. 24. R. Hard. 5.

That he would discharge from a promise of marriage; *quod exoneravit* is sufficient, without showing that he was present, or had notice; for a full discharge shall be intended. R. 1 Rol. 470. l. 5. Sti. 295. 303.

So, in *assumpsit* to pay, &c. if he disliked the land in fourteen days, it is sufficient to say, that he disliked; for it shall be intended within the time, otherwise it ought to be shown on the other part. R. Cro. El. 834.

So, if a promise be to pay in Spanish money; averment, that he gave a bill for so many dollars, is sufficient. R. 2 Cro. 7.

[\*]So, an averment, that the plaintiff has performed all on his part to be performed, is sufficient. R. on demurrer, Lut. 253.

Or, *quod cum* the plaintiff assumed to perform, &c. Hard. 103. a.

So, a declaration on *assumpsit* to pay so much to cure his daughter, and another count to pay so much for the cure, though he does not aver that he has cured, it is sufficient; for by the second count it appears that she was cured; and if this appears by any part of the record, it is well. R. after verdict. 1 Mod. 14. Dan. 73.

So, where something is covenanted or agreed to be performed by each of two parties at the same time; it is sufficient to say that he was ready and offered to perform his part, but that he was discharged by the other. Doug. 684.

< So the allegation of an offer of performance of a contract, in general terms, with an averment that the defendant did not attend at the time and place, and refused to perform the agreement on his part, is sufficient. *Miller v. Drake*, 1 Caines' Rep. 45. >

So, if one covenant with another to do a certain act in consideration of an award, it is sufficient to aver that the other prevented the stipulated thing from being literally performed, and accepted an equivalent. Doug. 272. Vide 1 T. R. 638.

Yet, an averment, that *paratus fuit et obtulit* to perform, is not sufficient, Vol. VI. 11 [\*79]

if he does not say, that he was hindered by the defendant. 2 Sand. 352. R. 1 Rol. 465. l. 30.

Yet, *parat. et obtulit.* will be sufficient after verdict. R. 2 Sand. 352. 2 Lev. 23.

So, *parat. et obtulit* is sufficient, where nothing is to be done on his part till the other has done a prior act: as, if A. being a bailiff, for 10*l.* assumes to arrest another at the suit of B.; it is sufficient to aver that he was ready, but B. did not deliver him any warrant. R. 1 Rol. 465. l. 40.

**(C 62.) When the consideration of a patent shall be averred :  
When it is executory.**

When the consideration of the king's patent is executory, the plaintiff in pleading such a patent must aver that the thing is done; as, if the king grants *pro eo* that I shall find a lamp, release a debt, &c.; it ought to be averred, that I have found the lamp, released, &c. 21 Ed. 4. 48. Pl. Com. 455. a. Hob. 231.

If a grant be *pro consilio impendendo*, he ought to aver that he was ready to give counsel. Jon. 294.

**(C 63.) Or the surmise of the party.**

So, if the consideration of a patent be the surmise of the patentee; as, if the king *pro eo* that the manor is escheated grants; it ought to be averred that the manor was escheated. 21 Ed. 4. 48, 49.

If the king grants an office with all fees, without naming any; in pleading, it ought to be averred that there are fees in certain, otherwise the grant is only a burthen and no interest, and therefore revocable at pleasure. R. Jon. 294.

**(C 64.) When not.**

But if the consideration of the patent be executed, it need not be averred; as, if the king grants for service done. R. Pl. Com. 455. a. Hob. 231.

**(C 65.) How it shall be alleged.**

And it is sufficient (when there ought to be an averment) to aver the consideration to be performed, without more; as, if the king in [\*]consideration of the surrender of a lease, grants; it is sufficient to aver the surrender made, without saying that there was a lease; for the surrender is the consideration. R. 1 Co. 43. a.

**(C 66.) When the continuance of an estate shall be averred.**

If the plaintiff claims under one who has only a particular estate, as, for life, he must aver continuance of the estate. Pl. Com. 431. a. Cro. El. 18. Vide post, (E 19, 20, 1, 2, 3, 4.)

So, he who claims under a tenant *pur autur vie*, ought to aver the life of the *cestui que vie*. Mo. 306. 335. Pl. Com. 31. a.

So, if the defendant avows for rent on a lease for years, if three persons so long live, he ought to aver that one of them is alive. R. 2 Mod. 93. 1 Mod. 217.

Or, for years, if the lessee so long live. R. Dal. 101.

**(C 67.) How it shall be averred.**

But implication that a life continues is sufficient; as, in ejectment for a  
[\*80]

rectory, if it be found that the rector *fuit et adhuc est seisit.*; it is a sufficient averment of his life. Dy. 304. a. R. 2 Jon. 227. Vide post, (C 77.)

So, in ejectment on a lease for years if the lessor live so long, *quod ejecit termino nondum finito*, is a sufficient averment of the life of the lessor; for the term would have been ended by his death. R. per three J. and aff. in Error. 2 Cro. 622.

So, in an avowry in right of a tenant for life, that the plaintiff *est, et tempore quo fuit, infra feodum*, is a sufficient averment of his life. R. 2 Cro. 637.

So, if the plaintiff, who claims by lease for a tenant for life, says, *virtute cujus fuit et adhuc est possessionat.* R. 2 Bul. 263. D. 1 Leo. 281. 1 Brownl. 4.

In trespass for inclosing land 1 *Maii*, in which he has common, *per quod* he lost his common; (*per quod*) is a sufficient averment that the inclosure continued till the time of common. R. but Dod. doubted, because it is the conclusion of the declaration, if it was not after verdict. R. 2 Rol. 379.

So, in ejectment on the demise of B.; if a special verdict finds that B. was alive, it shall be intended that he continued alive, if the contrary does not appear. R. 2 Cro. 146.

So, conusance as bailiff of husband and wife, seised in right of the wife who was tenant for life, for rent *aretro existente*, is a sufficient averment of the life of the wife on a general demurrer. R. 2 Lev. 88. Lut. 1226.

So, on a special demurrer. Per two J., but Hale doubted. 2 Lev. 88.

And by the stat. 21 Ja. 13. after verdict, the want of an averment of a life shall be aided, if he be proved to be alive. Vide Amendment, (Q).

So, by the stat. 4 & 5 Ann. 16. after judgment by confession, *nil dicit, non sum inform.*, or writ of inquiry executed.

### (C 68.) When it shall not be averred.

But the continuance of an estate of inheritance need not be averred, [\*]for it shall be intended, if the contrary does not appear; and therefore if a man claims under husband and wife, seised in fee in right of the wife, he need not aver the life of the wife. R. Pl. Com. 431. a.

So, if he pleads a conveyance by a tenant in fee. R. Lut. 357.

So, if he claims under a bishop, dean, &c. : he need not aver the life of the bishop, dean, &c. Pl. Com. 431. a.

Though the lease by the bishop was not confirmed, and so determines by his death. Per Dy. Pl. Com. 264. a.

So, if he claims by descent from tenant in fee, his estate shall be intended continuing till his death. R. Lut. 1172.

So, if he claims by a lease for years from husband and wife, who was tenant in tail, he need not aver the life of the wife; for she has the inheritance, and her husband is seised in her right. R. Pl. Com. 431. a. acc. Lut. 357. 1226. But it was R. that the verdict ought to find the life of the tenant in tail. Cro. El. 407.

So, if he claims by lease from husband and wife seised for their lives, and to the heirs of the husband. R. Cro. El. 112.

So, if a man makes title in assize to a rent charge against the feoffee of tenant in tail, he need not aver the life of the tenant in tail; for the estate of the feoffee continues till the discontinuance is avoided. R. Cro. El. 226.

So, if he pleads that it was the freehold of A. who demised &c.; he need not aver the life of A., for he shall be intended to have the fee, R. Cro. El. 87,

So, if an estate be granted to A. and his heirs till B. attains such an age, he who claims under A. need not aver the life of B. ; for the estate of A. who has a base fee, shall be intended to have continuance till the contrary appears. R. 1 Leo. 281.

If a lease be pleaded by A. tenant for life, and B. in reversion, there is no need to aver the life of A. R. 1 Leo. 177. Cro. El. 154.

So, if a man pleads an extent by *elegit*, he need not aver the continuance of his estate ; for it shall be intended, where it does not appear by record that the extent may have been satisfied. R. Hard. 80.

If lessee for life assigns his estate to A. who leases at will ; in trespass by the lessee at will, he ought to aver the life of the lessee for life ; but he need not aver the life of A. or the continuance of the will. 2 Leo. 95.

So, where the continuance of the estate is not necessary to the action, it need not be averred ; as, if a lease be for years, if A. so long live, and a covenant that he has power to lease, in covenant for a breach of it, the life of A. need not be averred ; for covenant lies though he be dead. R. 9 Co. 60. b.

### (C 69.) Averment of a request :—When there shall be a special request.

So, the plaintiff in his declaration ought to aver a request.

And, if the action be for a collateral sum to be paid on request, the request is parcel of the agreement, and traversable, and ought to be specially alleged, with the time and place of the request. Adm. Lut. 231. R. Cro. El. 85. R. Ow. 109. Cont. per two J. 1 Brownl. 10. R. acc. Jon. 56. 85. R. Sav. 72.

[\*] Or, for a collateral matter to be done upon request. Adm. Lut. 231. As in *assumpsit* to pay all sums expended for him. R. Cro. El. 83, 4.

To pay 6s. for every stone of wool delivered. R. Cro. El. 91.

To pay for victuals for him and his horse. R. 2 Cro. 183.

So, in covenant for not delivering timber for repairs, he ought to allege a special request. 1 Brownl. 23.

And the want of a special request, when necessary, is not aided by verdict. R. 3 Bul. 299.

Nor, by pleading *non assumpsit* and a verdict thereon : for that is no waiver of the request. R. Jon. 86.

Where it is agreed that A. should give B. a colt in exchange for B.'s mare, and should pay B. two guineas to boot, and that A. should keep the colt until the 29th day of September following ; in an action brought by A. he must allege a demand on B. for his mare ; and stating that B. did not deliver, although often requested so to do, is insufficient, and may be taken advantage of on a general demurrer. *Bach v. Owen*, B. R. M. 34 Geo. 3. 5 T. R. 409.

< One claiming the privilege of a well and pump in the land of another, both being bound to contribute equally towards repairs, cannot sustain an action against the owner of the land until after a request and refusal to repair. *Doane v. Badger*, 12 Mass. Rep. 65. >

### (C 70.) When a general request is sufficient.

*assumpsit* for money lent, or a mere duty, *liet sapius requisit*, is R. Cro. El. 73, 4. Agr. 2 Cro. 183. Per Hought. 2 Cro. El. 66. Hut. 2. per three J. Cro. Car. 55. Arg. 4 Leo. 2. R. 18. R. Win. 2. } *Lettingwell v. Pierpont*, 1 Johns. Cas. 99. *Urte*, 1 Johns. Cas. 319. *Pettibone v. Pettibone*, 5 Day, 324. *Jush*, 5 Day, 452. }



So in *assumpsit* for a collateral sum, if it is not to be paid upon request. R. Lat. 231. R. Ow. 109.

So, in *assumpsit* to pay in consideration of marriage ; for it is in the nature of a debt. R. Cro. El. 229.

So, in *assumpsit* for repayment of money received for a horse. R. 3 Lev. 364. Skin. 347.

So, in *assumpsit* to pay, if he would procure a note from B. for it ; that he procured the note, *et requisivit solvere*, is sufficient. R. 2 Vent. 74.

So, in case that if plaintiff made him a set of sails worth 15*l*. defendant would pay so much for them on request, *sapius requisit*, is sufficient. Wallis v. Scott, E. 4 G. Str. 88.

So, in debt on a bill, &c. to be paid upon request, a general request is sufficient. R. Cro. El. 548.

And where a special request is necessary, if the plaintiff alleges a special request but omits the day or time, and the defendant does not join issue on the request, but pleads *non assumpsit*, &c. it shall be aided. R. Jon. 56.

So, in annuity, obligation, &c. to pay upon request ; no request is necessary. R. Cro. El. 548. 721.

So, if the request is executed, no averment is necessary ; as, if A. promises to pay, &c. in consideration that B. at his request would be a knight. R. 2 Lev. 198.

{ A special request need not be laid, in all cases, where the consideration for the defendant's promise has been executed. Doty v. Wilson, 14 Johns. Rep. 378.

In an action of account a special demand need not be alleged or proved. Sturges v. Bush, 452. }

### (C 71.) How request shall be made.

And if a promise be by three, a special request to one is sufficient. D. Noy. 135. Vide Condition, (L 11.)

[\*] If an action be by an executor on a promise to pay to his testator on request, if he alleges a special request by the executor, and *licet requisit*, only by the testator, it is sufficient ; for the action is founded upon a request by the executor. R. Hard. 38.

### (C 72.) How alleged.

*Licet requisit*, is as well as *in facto requisivit* ; for *licet* is affirmative. R. Yel. 121.

And, if it be said that the plaintiff at such a day and place showed the note, *et requisivit*, it is sufficient without saying *ad tunc et ibidem* ; for the whole shall be intended to have been done at the same time. R. 2 Vent. 75.

So, if a special request be alleged in the first count, *similiter requisit*, is sufficient in the second count ; for it refers to the first. R. Cro. El. 240.

### (C 73.) Averment of notice :—When necessary.

So, the plaintiff ought to aver notice given to the defendant, where the action does not lie without notice given ; as, if the act, on which the plaintiff's demand arises, be secret, and lies only in the plaintiff's mouth ; as, if a man promises, &c. to pay such a rate for wares as another paid him, the plaintiff ought to allege notice of the rate that another gave. R. 2 Cro. 432. R. 1 Rol. 463. l. 25. Hob. 51. Hard. 42. Vide Condition, (L 8, 9.)

To deliver so much corn, if the plaintiff approve of it, at the fair; the plaintiff ought to give notice, if he approved of it. R. Cro. El. 249, 250.

To repay so much to B. if he disliked such lands. R. cont. Cro. El. 834. 1 Rol. 464.

To seal such an escrow as he or his counsel shall devise. R. 1 Rol. 463. l. 5. 50.

To account before auditors, whom the obligee shall assign. R. 1 Rol. 462. l. 50.

To pay plaintiff all his costs in such a suit. Hard. 42.

The damages which the plaintiff sustained by such a battery. Hard. 42.

When rent is due to the landlord, notice of it must be given to the plaintiff in execution, or to the officer, to maintain action against either of them respectively. *Palgrave v. Windham*, M. 6 G. Str. 212.

{ But in an action on a foreign bill of exchange, for non-payment, no averment of a presentment for acceptance, or of a refusal and protest for non-acceptance of the bill, is necessary. *Brown v. Barry*, 3 Dall. 365. }

### (C 74.) How it shall be alleged:—How request shall be alleged.

When notice is necessary, it ought to appear that it was given in due time; as, if a man promises to pay as much as he disburses at such a fair, before the end of the fair, he ought to allege notice of his disbursements given before the end of the fair, otherwise it will be too late. R. 1 Rol. 469. l. 45. Vide ante, (C 72.)

So, it ought to appear that it was given to a proper person; as, if a condition be to repair upon notice, notice ought to be alleged to him who had the entire interest, and not to an under lessee. R. Yel. 37. 2 Cro. 9.

And to him in person. R. Yel. 37.

[\*]What payment shall be to the assignee of the whole estate. Vide Condition, (G 2.)

So, where request shall be to the person. Vide Condition, (L 11.)

But on a sale of East India stock, if demanded *ore tenus*, or by writing at the East India house, an averment, that he demanded *ore tenus*, and by writing at the East India house, is sufficient, without a personal demand; for the usage is such. R. Skin. 391.

### (C 75.) When not necessary.

But if a man is bound, covenants, or assumes to pay money, to convey lands, &c. on the performance of an act by a stranger, notice need not be alleged; for it lies in the defendant's cognizance as well as the plaintiff's, and he ought to take notice at his peril; as, if he assumes to pay so much when A. marries. R. 1 Rol. 462. l. 10. Vide Condition, (L 9.)

When A. returns into the kingdom. R. 2 Cro. 462, 3. R. 1 Rol. 463. l. 6.

Or, performs such a journey. 1 Rol. 463. l. 13. R. 2 Cro. 137. 150.

So, if he assumes, &c. to pay so much as A. shall name. R. 2 Bul. 144. R. Cro. Car. 133. 1 Rol. 464. l. 5.

To pay if A. does not pay. R. 2 Cro. 684. R. 1 Rol. 462. l. 25. 463. l. 45.

To pay so much for every acre above 20, when A. measures them. R. 1 Rol. 462. l. 35.

To make such assurance as A. shall advise. D. 1 Leo. 105.

Or, as his counsel shall advise. Per Gawdy, 1 Rol. 464. l. 2.

To discharge upon all escapes. R. Hob. 14.

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To stand to the award of such a one. Hard. 42.

To pay the arrears found on account. 8 Co. 92. b.

To be accountable for all money paid to A. by B. R. 1 Lev. 47.

So, if he assumes, &c. to pay, &c. on the performance of a certain act by the obligee himself, or on the performance of an act by him to any certain person; for he takes upon himself to take notice of it at his peril; as, if a man assumes, &c. to pay on the marriage of the obligee, &c. with B. R. 2 Cro. 102. R. 2 Cro. 228. Yel. 168. R. 2 Cro. 405. 1 Rol. 461. l. 50. R. Cro. Car. 34. Hut. 80. Per Ch. J. 1 Sid. 36. 1 Rol. 463. l. 20. R. 2 Bul. 254. R. 3 Bul. 326. R. Poph. 164.

To pay, when the obligee &c. delivers a horse to B. Per Yel. 1 Rol. 461. l. 45.

Or, returns to London. Per Dod. 2 Bul. 145. R. 1 Rol. 462. l. 15. Cont. per Warb. Hob. 68. R. cont. 1 Bul. 44.

Or, returns from Rome. Dub. Ow. 108. R. Hut. 80.

Or, delivers up the bond. R. Sal. 457.

To indemnify when he shall be surety for his father to A. D. 1 Leo. 105. R. 2 Cro. 287.

If the condition of a bond be to indemnify the obligee from alimony and debts incurred by his wife after their separation, the obligee being sued for a debt of his wife's, need not in an action on the bond, allege notice of the action commenced; but without such allegation, is entitled to the costs of the action as well as the debt. 1 T. R. 374.

[\*] To pay, if he borrows of any certain person. Per three J. 1 Bul. 12.

To pay for every acre, when it shall be measured. R. 2 Cro. 472. 391. 1 Rol. 462. l. 45.

To pay a rate for what the plaintiff shall sell to B. R. 2 Cro. 432. R. 1 Rol. 463. l. 36.

To pay when B. attains his full age. Hard. 42.

To surrender to B. or his assigns, on request, there need not be notice of the assignment. R. Poph. 136. 1 Rol. 464. l. 10.

To give him as much as will make him content. R. 1 Leo. 123.

To pay all money delivered by A. to B., there need not be notice of the sums delivered to B. R. Hard. 42.

So, if he assumes in consideration of such a certain act, it is sufficient to aver performance of the act, without alleging notice of the performance to the defendant: as, if it be in consideration that she discharged him of a promise of marriage, it is sufficient to say *quod exoneravit ipsum*, without alleging that he had notice; for it shall be intended that there was a full disengagement made to the defendant himself in person. R. 1 Rol. 470. l. 5.

Debt for freight on a charter-party; if the goods are laid to be delivered to defendant himself, the plaintiff need not aver notice of the delivery. *Dodd v. Atkinson*, M. 10 G. 2. B. R. H. 342.

So, in consideration that she come to his house and offer to marry him, it is sufficient to say, *quod venit et obtulit* to marry; for it shall be intended that the offer was to himself in person. R. 1 Rol. 470. l. 20.

So, in debt for a penalty at a leet for not removing an encroachment, it is not necessary to aver notice of the order of removal; for every one within the leet ought to take notice of it. R. 1 Rol. 468. l. 20.

Or, for the penalty of a bye-law concerning a common; for every commoner ought to take notice of it. R. Cro. Car. 498.

(C 76.) When a fact shall be averred : — To ascertain the case to be within a statute.

So, the plaintiff, in his declaration, ought to aver every fact ; without being informed of which, the court cannot judge whether the plaintiff has cause of action. Vide Action upon Statute, (A 3.)

As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the court that his case is within the statute ; as, in *quare impedit* by the king on the st. 13 El. 12. for not reading the thirty-nine articles, it ought to be averred that it was a benefice with cure. R. 1 And. 62. Lut. 1089.

{ So in a complaint for the maintenance of a bastard child, every averment must be made to bring the case within all the provisions of the statute ; as that the complainant accused the reputed father in her travail, and had been examined on oath before a justice, and had continued constant in her accusation, &c. The averment that she had been delivered of a bastard child, and that the defendant was the father, are not sufficient. *Drowne v. Simpson*, 2 Mass. Rep. 444.

It is not sufficient in an indictment for an offence created by statute, to allege the same to have been committed *against the law in such case provided* ; the words *contra formam statuti*, or other words equivalent must be used. *Commonwealth v. Stockbridge*, 11 Mass. Rep. 279. *Same v. Springfield*, 7 Mass. Rep. 9. *Same v. Morse*, 2 Mass. Rep. 138. *Reynolds v. Smith*, 2 Brown, 257.

So where a penalty is given by statute, recoverable in a civil action. *Peabody v. Hayt*, 10 Mass. Rep. 36.

So where a new remedy, or new cause of action is given by statute, the plaintiff must bring himself within it. *Lowden v. Moses*, 1 M'Cord, 121. }

So, in *quare impedit* by the king founded on the st. 31 El. 6. for simony. Somb. Lut. 1089.

So, in *quare impedit* by the university on the st. 3 Jac. 5. for the benefice of a recusant, the plaintiff must aver that the patron was a recusant convict. R. 10 Co. 58. a.

So, in an action on the st. 7 Ed. 6, 7. against buying wood, coal, &c. in London, Westminster, or suburbs, and selling again unless by retail, if the plaintiff alleges that the defendant bought at Whitechapel, &c. he ought to aver that Whitechapel is within the suburbs. Litt. 162.

If a man entitles himself by a lease, which by a proviso in a statute will be good, if the ancient rent be reserved ; he ought to show that [\*]a rent was reserved, and aver it to be the ancient rent. R. Pl. Com. 105. b.

If, on an action on the st. 14 H. 8. 5. for practising physic within seven miles of London without a license, he alleges practice at Westminster, and does not say that it was within seven miles of London, it is bad. R. 4 Mod. 47.

If an indictment be for taking toll above the rate appointed by a statute, it must be averred that it was in a market town. 2 Rol. 248.

So, in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred ; as, where the st. 1 R. 3: 1. makes a feoffment, &c. by *cestui que* use of full age, sane, and at large, &c. good ; he, who pleads a feoffment by *cestui que* use, ought to aver that he was sane, of full age, and at large. Pl. Com. 376. b.

If a man pleads a license by three justices of the peace at sessions, to be a jobber, &c. he ought to aver that he is a householder, &c. which is requisite by the st. 5 El. 12. in him who takes such license. R. Sav. 58.

So, where the st. 25 G. 3. c. 51. s. 27. relative to persons licensed to let post-horses, requires that the account directed to be given in by them shall contain the number of horses and miles, and the names of the drivers, but inflicts no penalty for not inserting the amount of the duties received by the post-master; if the declaration in an action on that statute only charge that the defendant made false accounts by not inserting the amount of the duties received, without alleging them to be false in the particulars mentioned by the statute, judgment shall be arrested after verdict. 3 T. R. 636. Vide supra, (C 50.)

So, if a plaintiff declares upon an agreement in writing, which refers to a case to be stated and signed by both parties, he ought to show the case stated, and then aver that that and the case in the declaration are the same; for it is not sufficient to say that he agreed in such a manner, and that both bound themselves in *pignoratione prædict.* R. Lut. 489.

So, if a condition be, that a lessee shall not oust the tenants of a manor, who do their duty, it is not sufficient to say that he ousted A., a tenant of the manor who did his duty; but he ought to aver in fact that A. was tenant and always did his duty. R. 1 Leo. 246.

If a promise be to save harmless for beasts delivered out of the pound, he ought to aver that he delivered them, and it is not sufficient to say that A. recovered against him in *parco fracto pro deliberatione.* Skin. 141.

So, the case ought to be averred agreeable to the statute: as, if the st. 28 El. be pleaded, which enacts, that a recusant shall be convict, if he render not himself before the next sessions; if it be pleaded that he did not render himself at the next sessions, it will be bad. 3 Lev. 333.

So, in all cases where there is a variance of the description of a thing or person, there ought to be an averment that it is the same: as in an information for an intrusion into lands in N. Dale, if the defendant pleads a grant to him of lands in S. Dale, he ought to aver that they are the same. Sav. 48.

If the license of alienation be for a rectory, and twenty acres of land [\*] and the fine be of a messuage, and twenty acres of land in process for aliening without license, it ought to be averred that the messuage is parcel of the rectory. Sav. 14.

In an inferior court the declaration must allege that the money was had and received within the jurisdiction, as well as that the defendant promised to pay within it. 1 T. R. 151.

And where one count of a declaration in an inferior court is not laid within the jurisdiction of that court, and the damages are given generally, the objection is fatal on a writ of error, although there be another good count. Ibid.

If in *assumpsit* for 50*l.* for oaks sold, the defendant pleads a contract for oaks by indenture, he ought to aver that they are the same oaks. Sav. 17.

On a *quo warranto* for having a part within the metes and regard of a forest; if the defendant prescribes for a park *infra metas*, it is not sufficient without averring that it was *infra regard.* of the forest also. Bridg. 25.

So if the executor of H. *de B.* be sued, and he pleads a judgment against him as executor of H. *de C.*, he ought to aver that H. *de C.* is the same person. R. Sav. 92.

If A. assumes to deliver to B. a parcel of gum, then upon the sea, to be imported, being of the same value as other gum before delivered; it must be alleged that it was the gum on the sea, &c. R. 2 Cro. 236.

So, if the thing be averred is repugnant in words, but not in truth, it ought to be explained before the averment made; as, if a grant be of land in A., to an information for land in B., it cannot be averred to be the same land, unless it be explained that A. is a vill in the parish of B., or, is known by



the name of B. as well as A., and then it may be averred to be the same land. Sav. 38.

(C 77.) By what words an averment shall be.

An averment need not be in express words, *et A. in facta dicit* ; for *licet* is a sufficient word. R. 2 Cro. 383. Pl. Com. 125, 126. R. 3 Lev. 67. Vide ante, (C. 67.) Post, (2 V 2.)

Or, *pro eo quod*. R. 1 Sand. 117. Semb. 2 Vent. 278. R. 1 Lev. 194.

*Et quia, &c.* Co. Ent. 122. b. 1 Lev. 194.

*Quod vendidit warrantizando* is a sufficient averment that he warranted. Sal. 686.

Or, that he demanded *proferendo satisfactionem* is a sufficient averment of a tender. R. Sal. 686.

So, any words which imply such a matter to be so, are sufficient ; as, if it be pleaded, that A. was seised, and that *obiit*, and the land descended to B., as his son and heir ; this is a sufficient averment that he died seised, though it be not said *sic inde seisit. obiit* ; for otherwise it could not descend to B. as his heir. R. Lut. 1172.

So, in an information for writing and publishing a libel “ of and concerning the king’s government, and the employment of his troops,” (setting forth the libel *verbatim*,) the words “ of and concerning” are a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written “ of and concerning the king’s government, and the employment of his troops.” Cowp. 672.

[\*]So, a complaint having been made *ore tenus* by a solicitor, before the chancellor, in the court of chancery, of an arrest in returning home after the hearing of a cause ; the indictment stating, that “ at and upon the hearing of the said complaint” the defendant deposed, &c. is a sufficient averment that the complaint was heard. 1 T. R. 70.

So, *presentat. fuit*, that he did a trespass ; though it be not expressly averred that he did it. Semb. 2 Cro. 582.

*Quod scribi et ingrossari fecit indenturam, per quam mentionat. quod demisit. &c. quam sigillavit et deliberavit ut fact. suum virtute cujus fuit possessionatus* ; though it be not expressly said, *quod demisit*. R. 2 Jon. 24.

*Indentura fact.* between lessor and lessee, whereby lessee *convenit et agreevit* to pay the rent, is a sufficient averment of a sealing by him. Atkinson v. Coatsworth, P. 8 G. Str. 512.

That by the custom of London, they hold pleas of debt, arising within the city, and that he levied a plaint according to the custom, is a sufficient averment, that the debt, for which the plaint was levied, arose within the city. R. Vau. 92.

That he paid a debt of his intestate, and took a term in satisfaction, imports that he paid it with his own money. R. 1 Lev. 154.

That by refusing a poll *perdidit officium*, imports that he had a majority, if the poll had been taken. R. 2 Lev. 50.

An avowry by a husband seised in right of his wife, for rent *arctro existen.*, is a sufficient averment of the life of the wife. R. on a special demurrer. 2 Lev. 88. Vide ante, (C 67.)

So, if a covenant be to make a surrender of a copyhold, and he says, *quod sursum reddidit* to two tenants according to the custom, it is sufficient, without showing the custom. R. 1 Mod. 61.

If the matter be to be determined by the groom porter : an averment, that he adjudged *in casu prædict.*, is sufficient. R. Lut. 488.

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In debt against an executor for 10*l.*, which *injuste detinet*; it is a sufficient averment that the testator did not pay. 1 Vent. 136.

So, in debt against A. on articles, that he or B. would pay, for 10*l.* which *A. injuste detinet*; if B. sealed, it is a sufficient averment that B. did not pay. R. 1 Vent. 136.

So, *quod A. seisitus de manerio unde prædict. messuagium fuit parcell. a tempore cujus, &c.* levied a fine, is an averment, that it was parcel at the time of the fine. 1 Leo. 75.

That A. demised to B. who entered, and being possessed *revertione eidem A. spectan.*, &c., is a sufficient averment, that A. has the reversion. R. 1 Sal. 13.

If a custom be alleged for tenants to erect stalls in a market, it is a sufficient averment, that the market is within the manor. R. 3 Lev. 190.

If breach be, that the defendant did not cover with lead, according to the rules prescribed by the statute for the rebuilding of London; it is an averment, that the statute does require it. R. 2 Lev. 85.

That he entered, without saying, by night or by day, is sufficient if he says *he entered lawfully*. 2 Mad. Ca. 320.

On an agreement to ride *absque flagello vel baculo vel aliis armis; absque flagello et baculo, vel aliis armis*, it is good. *Burgess v. Bracher*, P. 10 G. 2 Ld. Raym. 1366. Str. 594.

[\*](C 78.) When an averment is not necessary:—Of matter apparent to, or presumed by, the court.

But a matter apparent to the court need not be averred: as, if a man shows that his tenant aliened in fee to a dean and chapter, and that he as lord entered within a year, he need not aver, that such alienation is mortmain. Pl. Com. 81. a.

So, an action on the st. 32 H. 8. 9. of maintenance, it need not be averred, that the thing bought was a pretended right, &c. Semb. Pl. Com. 81.

In case, for falsely and maliciously suing out commission of bankrupt against plaintiff, it is not necessary to aver that plaintiff never committed an act of bankruptcy. *Chapman v. Pickersgill*, M. 3 G. 3. 2 Wils. 145.

Privilege of peerage will be noticed without pleading. Lofft, 49.

In pleading, if the knowledge of a state of things, which, if existing, favour one party, lies rather with him than his adversary, their non-existence will be presumed, until he avers that they do exist. 4 M. & S. 120.

In pleading, if the one party has, by his conduct admitted the existence of a particular state of things necessary to the support of his adversary's claim or defence, and it also lies peculiarly in the knowledge of such party rather than his adversary, whether or not they do exist, their existence will be taken for granted, until he avers to the contrary. Ibid.

The presumptions are, that every man conforms to the law. Therefore, ecclesiastics need not prove that they have read the thirty-nine articles, or the like, until a presumption to the contrary has been raised. 2 Blk. 851.

In a declaration for defaming a candidate to serve in parliament, the writ need not be stated. 1 N. R. 47.

Covenant on a charter-party by the owner against the freighter. The covenants on the defendant's part were, that they should load a full cargo. No claim for short tonnage was to be admitted, or allowance made for the same by the defendant unless certified by defendant's president, &c. which president should give, if reasonably demanded, "and also unless short tonnage be made to appear, on arrival in the Thames, by the survey of four shipwrights." The defendant's president refused to certify a deficiency which was averred to exist. Motion in arrest of judgment, for

not averring such survey, had been made, &c. judgment for the plaintiff. For by averring a request and refusal by the company's president to grant certificate, and having thus shown that it was impossible through the default and neglect of those persons, to perform that which may be assumed to be a condition precedent, that was equal to performance. That thus a right of action for compensation for short tonnage being once vested in the plaintiff, it could only be divested by a subsequent non-feasance, namely, neglecting to procure a survey; and if the fact was so, it was for the defendant to plead it. It was a circumstance which was to defeat the plaintiff's right of action once vested, and was therefore in its nature matter of defence. 1 T. R. 638.

On demurrer to a declaration on a bail bond, for a contempt, the court will not presume the plaintiff had no authority to take bail; but some case must be made upon the pleadings. 2 Blk. 955.

Where a bailee undertakes to procure a qualification, without which the property would be liable to seizure, if afterwards seized, as for want of qualification, the proof that he was qualified lies upon the bailee; and it is sufficient, in an action against him for the loss, to aver generally that they were seized as forfeited for the particular case. 7 T. R. 171.

[\*](C 79.) An averment of that, which appears otherwise to the court, does not avail.

And if a man avers contrary to that which appears to the court, it is of no avail, but shall be rejected; as, if a man avers that land is appurtenant to a messuage, which cannot be by law. R. Pl. Com. 170. b.

If an obligation be in 200*l.* penalty, for the payment of 104*l.*; plea, that the plaintiff released the said obligation by the name of an obligation of 200*l.* for the payment of 100*l.* and that no other obligation was given, is not good; for an obligation for the payment of 100*l.* cannot be an obligation for the payment of 104*l.*, and the averment that he released the said obligation cannot avail. R. Al. 71.

If the king by patent grants lands in A. and B., and to an information for an intrusion into lands in C. and D., this grant is pleaded, with an averment that they are the same lands, it is bad; for it is impossible that land in one vill should be the same with land in another vill. R. Sav. 38.

Where two judgments refer to the same day, the priority of one cannot be averred. 1 T. R. 117.

### (C 80.) Matter *ex abundanti*.

Nor matter surmised *ex abundanti*; as, if the plaintiff alleges a condition subsequent to his estate, he need not aver performance; for the allegation was, *ex abundanti*. Pl. Com. 30. a.

### (C 81.) Matter which comes properly from the other side.

Nor, matter in defeazance of the action; for this will come more properly from the other side; as, in debt, on the st. 23 H. 6. 14. against bailiffs, for not returning him a burgess, there need not be an averment that there is no mayor, though the statute says, that the sheriff shall send his precept to the mayor, and if there be no mayor, to the bailiffs; for if there be a mayor, it shall be shown by the defendants. R. Hob. 78.

So, where there was a covenant in a charter-party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties," in an action for short tonnage, it is not

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necessary for the plaintiff to aver that a survey was made, and short tonnage made to appear; if such survey was not taken, that is matter of defence to be taken advantage of by the defendant. 1 Term Rep. 645.

In trespass *quare canem*, viz. a bloodhound, *cepit*, it need not be averred that the plaintiff can expend 40s. *per ann.* 12 H. 8. 3.

If a breach of covenant be assigned in pulling down a house, it need not be averred that this was not a house allowed to be pulled down. R. 1 Leo. 18.

If the defendant in trespass justifies entry by process on a *homine replegiendo*, to do execution, he need not say, that the man to be replevied was not taken by the command of the chief justice, &c. Semb. Lut. 1433, 4.

In false imprisonment, it is sufficient to say that he took him by force of a *capias*, without saying how it was returned. Pl. Com. 16. b.

[\*] If a man pleads a fine, it is not necessary to show, that the person barred by nonclaim was sane, of full age, &c.; for this shall come from the other side, not being put in the purview of the act, but as an exception. Pl. Com. 376. a.

So, if he pleads, that such an one, being seised made his will, he need not say, that he was of full age, &c. Pl. Com. 376.

Or, that tenant in tail demised, he need not say, that he was of full age, though this is requisite to his making a lease by the st. 32. H. 8. 28. 1 Leo. 76.

### (C 82.) Inducement.

Nor, matter, which is only inducement; as, in an action upon the case for an escape upon a *capias utlagatum*, in the recital of the outlawry in the declaration, it need not be averred by *proul palet per recordum*. Lut. 111. R. 5 Mod. 9, 10. and is now aided by the st. 4 & 5 Ann. 16.

Yet some precedents do it. Lut. 111.

So, in escape after a commitment in execution on a judgment, it will be good without such averment. R. on general demurrer. Sal. 565.

### (C 83.) An immaterial thing.

So, a description, not material, need not be averred; as, if a man makes title by prescription to a portion of tithes, and that the tithes came to the king, who granted them by the name of all tithes, part of the demesnes of the archbishop, &c. and in the tenure of B., it need not be averred, that they were part of the demesnes, or in the tenure of B., for the tithes are otherwise described and ascertained, and whether it be true or false, the grant will be good. R. Dy. 87. b.

### (C 84.) Conclusion of a declaration.

A declaration generally ought to conclude *ad damnum* of the plaintiff.

But in an action by a prior and his brethren, *ad damnum ipsius prior.*, it is sufficient. Th. Dig. l. 10. c. 25.

Or, *ad damnum ipsorum*. Ibid.

So, in an action by husband and wife for battery, &c. of the wife, *ad damnum ipsorum*, is good. Ibid. Vide post. (2 A 1.)

Yet, in trespass, *quod clausum fregit et bona B. ibidem cepit ad damnum ipsorum*, is bad. R. 2 Mod. Ca. 370.

If an action for penalties brought by the farmer of the tax, on 27 Geo. 3. c. 26. by which the duties on post-horses, leviable under 25 Geo. 3. c. 51. were transferred

from the king to the farmers of the tax,) the offence may be laid to have been committed with intent to defraud the farmer and not the king. 3 T. R. 632.

If, in the conclusion of a declaration, the plaintiff claims more or less than his due, it is bad, generally; as, in debt on a bond for forty pounds, if the declaration concludes his demand for forty marks, it is bad, if he does not show how the residue is discharged. Per Cur. 48 Ed. 3. 3. a. Vide post, (2 W. 7.)

So, in debt for rent, for one year and a half on a lease, rendering 74*l.* per ann. if he concludes his demand for 100*l.*, it is bad, without saying how the residue is satisfied. Semb. 2 Lev. 4. R. Cro. Car. 137.

[\*]So, if the plaintiff avows for 10*s.* per ann. on a lease, rendering 5*l.* per ann. it is bad, without saying how the residue is discharged. 20 Ed. 4. 2. a. R. Cro. Car. 104. R. Hut. 96.

So, in debt for 6*l.* 14*s.* 2*d.* if the plaintiff declares on several contracts, that one for 3*l.* 10*s.* 6*d.* the other for 3*l.* 3*s.* 5*d.* and has a verdict and judgment for the whole, it is error; for the judgment is for 3*d.* more than is due. R. Mo. 298. Cont. Cro. El. 22. R. Yel. 5.

So, if the plaintiff has judgment for more damages than are alleged in his declaration, it is error. R. 1 Bul. 49.

But, if it may be rejected as surplusage, it is good; as, in debt for 10*l.*, if the plaintiff declares on a contract for 10*l.* for a horse, and for 5*l.* for a cow, and the defendant pleads to the 10*l.* *nil debit*, and a verdict and judgment be thereupon, it is good, for one contract answers to the plaint, and the other shall be rejected as surplusage. R. Yel. 5.

So, if it be only a miscasting, it will not hurt; as in an action on the stat. 2 Ed. 6. 13., for no setting out his tithes, if the plaintiff shows that the tithes were of the value of so much per acre *in toto attingen. ad 11*l.* per quod actio accrevit ad habend.*, for the treble value of 33*l.* where it is miscast for 11*l.* 2*s.* and the treble value 33*l.* 6*s.*, it is good; for the demand is not for a sum certain, but ought to be given by the jury. R. 2 Cro. 499.

So, in *assumpsit* for 200 weight of prunes at 19*s.* per cent. *in toto attingen, ad. 180*l.** where it should be more and the jury gives 100*l.* damages, such miscasting does not hurt. R. cont. by all in C. B. and Exch. 2 Cro. 247. R. acc. Hob. 89. R. 2 Cro. 569.

So, in *assumpsit*, where there are several counts for several sums *quæ attingunt ad 52*l.**, which is more than the total of the sums; this miscasting does not prejudice, if the jury give less in damages than the total. R. Latch. 175. R. Poph. 209. R. 2 Lev. 58.

So, in covenant, *assumpsit*, &c. if the plaintiff demands more or less than is due, it does not prejudice. Semb. 2 Lev. 57. Vide post, (2 V 2.)

So, in debt for 100*l.*, if the plaintiff declares on particular sums due which exceed 100*l.*, and the defendant does not demur, but there is a verdict for the plaintiff; if he releases all above 100*l.*, he shall have judgment for 100*l.* R. 5 Mod. 214.

No, if the declaration be, *ad damnum* 40*l.*, where the writ was only 20*l.*, if the verdict finds less damages than the writ, it is good. R. 2 Cro. 628.

So, if it finds greater damages, and the plaintiff *remittit damna*; for he shall not have more damages than are in the writ. R. 2 Cro. 128.

In alleging special damage, it is sufficient to state, that by reason of the premises, the consequences happened. The particular manner in which they were produced is matter of evidence. 1 T. R. 508.

< In action founded in tort, an allegation of special damage is unnecessary; but where the law does not necessarily imply such damage, it must be averred. *Parsons v. Baldwin*, 1 Conn. Rep. 313. >

If the nature of the case precludes a very circumstantial account of the special  
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damage sustained, less certainty in describing it will be required, and so much as the subject matter allows will suffice, for *lex non cogit ad impossibilia*. Therefore, where the plaintiff declared that he was a dissenting minister, employed to preach at a certain chapel, and that, in consequence of the defendant's defamation, persons frequenting the chapel had refused to let him preach there, and had discontinued giving him the profits which they [\*] usually had, and otherwise would have bestowed, not stating who those persons were; upon a motion to arrest the judgment for this omission, the declaration was held good inasmuch as it was impossible for the plaintiff to ascertain of what individuals the congregation was composed, it being a numerous, fluctuating, and uncertain body of men. 8 T. R. 130.

(C 85.) When a declaration shall be aided :—By the bar.

Sometimes a defect in a count or declaration shall be aided by the defendant's bar; as, if the plaintiff, in *assumpsit* to perform an award, does not show special performance on his part, and the defendant does not demur, but pleads, no such award, he waives the other matter, and cannot afterwards take advantage of this defect in the declaration. R. Cro. Car. 385. R. Lut. 253. Vide post, (E 37.)

So, if in an action for an escape by an administrator *durante min. ætate* of an executor, it is not averred that the executor is within the age of seventeen years, if the defendant pleads a removal by *habeas corpus*, which is the same escape, he shall not take exception to the want of averment; for he admits that the plaintiff has authority to sue. R. Lut. 632. a.

So, in debt for rent, if the plaintiff does not show any place where the lease was made, if the defendant, by his plea, admits the lease, the declaration is aided. R. Hob. 82. R. 2 Cro. 682. R. 2 Rol. 66. 2 Cro. 125.

So, in covenant, if the defendant pleads *non est factum*, this aids a breach badly assigned; for the defendant admits the breach, if it was his deed. R. 2 Cro. 370.

So, in an action for rent, without saying how much is due, or on what contract, if the defendant pleads payment, he cannot afterwards except to the uncertainty of the declaration. R. 2 Cro. 668.

So, in debt on a bond, if the defendant demands oyer, and pleads payment. R. Cro. Car. 209.

So, in an action for words for saying, you are foresworn, without saying in what court, if the defendant justifies, for that he took a false oath at the sessions. R. Cro. Car. 288.

So, in debt for an escape on a commitment in execution, without saying *prout patet per record.*, if the defendant pleads a license from the plaintiff; for he admits the commitment. R. 3 Lev. 393.

So, in trespass, *quare pullos cepit*, without an *anglice*, if the defendant justifies, he aids the uncertainty. R. Lut. 1492.

In trespass, *quare 100 cataractas, vocal.* wears, *aut fensur. prostravit*, if defendant justifies in the words of the declaration; the plea taking notice that wear and fence are the same thing, makes the declaration good. Luke v. Helmer, T. 12 G. Fort. 377.

In *assumpsit*, to pay when he receives money, without alleging the time when, or from whom, it will be aided by the plea of *non assumpsit*. R. 1 Mod. 169.

In an action for disturbing him in his way, without showing the vill or county, where the close to which, &c. lies, if the defendant pleads not guilty, it is good; for then the obstruction only is material. R. Noy, 9.



In debt for rent, where the plaintiff does not show where the lease was made, if the defendant pleads *nil debet*. R. 2. Cro. 125.

[\*]So, if the count wants time, place, or other circumstances, it may be aided by the bar. R. 8 Co. 120. b. Vide supra.

As, if the count wants the time or place of the adjudication upon which it is founded, when it is confessed by the bar. R. Lut. 487.

If a bond be alleged in a count, and it is not said where it was made, and the defendant pleads *per duress apud B.*, for he admits the bond was made. Dy. 15. a.

In *quare impedit*, if declaration does not aver next turn to be plaintiff's, yet it is helped by defendant's pleading over. Bishop of London v. Mercers' Company, H. 5 G. 2. Str. 925.

And it is a general rule that, when the defendant has pleaded over, he cannot afterwards object to want of form in the declaration. 3 Wils. 297.

But, if the count be defective in substance, the bar cannot make it good. D. 8 Co. 120. b.

As in an action for words, thy father, &c. without saying the plaintiff was present, or that the speaking was to him; though the defendant justifies, and thereby acknowledges the words, this does not aid the declaration. R. Cro. El. 416.

So, if an avowry, which is in the nature of a count, shows a grant of a rent for life out of an estate for years: though the plaintiff in his bar shows that the grant was also out of a freehold, it does not aid the avowry. R. 7 Co. 25. a.

So, if the defendant pleads, as to all, except a particular part, not guilty, and as to that part justifies, matter confessed by the justification does not aid a defect in the other plea; for they are *quasi* distinct pleas. R. 2 Cro. 87.

{ And so in an action of slander where the words charged are insufficient to sustain the action, the inadequacy of the count cannot be made good by a justification and confession of the words in the bar. Pelton v. Ward, 3 Caines' Rep. 73.

In trespass *qua. clau. freg.* by proprietors of common lands, the plea of *not guilty* admits the existence of the proprietors as mentioned in the writ. Proprietors of the Kennebeck Purchase v. Call, 1 Mass. Rep. 485.

And a special plea admits all the facts to be true, which are well pleaded, except the one put in issue. Thus, in an action for dower, wherein issue was taken on the demandant's marriage, and the seisin of her husband, she was not held to prove a demand of her dower, &c. Ayer v. Spring, 10 Mass. Rep. 80.

If the performance of a part of conditions precedent be not averred by the plaintiff, yet if it appear from the defendant's plea, or by his notice under the plea, that the part in question has been performed, the declaration is cured. Zerger v. Sailer, 6 Binn. 24. }

### (C 86.) By the writ.

So, a defect in a declaration may be aided by the plaintiff's writ; for in C. B. the writ is part of the count; and therefore in trespass, *vi et armis*, be omitted in the count, but mentioned in the recital of the writ, it is sufficient. R. Lut. 1509. Vide ante, (C 12.) Cro. Jac. 536.

In battery, there was *quod cum* in the declaration. *Per curiam*, (dissent. Fortescue.) This is aided by the writ; which is, *quare* he did the trespass. Rogers v. Gibbs, P. 3 G. 2. Fort. 376. Vide 2 Wils. 203. acc.



In trespass, declaration for taking dung and soil (without saying of plaintiff,) is aided by recital of the writ, in which it appears it was plaintiff's dung and soil; though there is no original (if after verdict.) *Franklyn v. Reeve*, M. 9 G. 2. Str. 1028. *Dubitante Hardwicke C. J.*; for the writ contains no averment, but is interrogatory. *Et per Lee C. J.* It has not been determined in B. R. that in trespass of declaration *quod cum* is aided by the writ. *Goodright v. Hodgson*, M. 12 G. 2. Andr. 282.

*Quare cum* in trespass helped by the recital of the original after verdict. *Barnes*, 249.

### (C 87.) By verdict.

So, if the declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff; as, in *assumpsit*, reciting that the defendant had sold to him all the furzes growing upon such land, to be taken before such a day, the defendant, in consideration, &c. promised that the plaintiff should not be disturbed in carrying them away; he does not [\*] say that he was disturbed before such day: yet this is aided by the verdict. *R. Cro. Car. 497. 3 T. R. 147. Vide post, (E 38.)*

So, in debt for rent by the grantee of a reversion, if attornment be not alleged, yet it is aided after verdict; for if it was not proved, plaintiff would have been nonsuit. *R. Ray. 487. 2 Jon. 232.*

So, the want of a place, where a lease was made, is aided by verdict. *R. 2 Rol. 66.* where the issue was upon a collateral point, by which the lease is admitted. *Vide ante, (C 85.)*

So, in an action upon the case against a sheriff, if the plaintiff alleges that the sheriff *potuit arrestare* A., against whom a writ was delivered to him, though he does not say that he was in his presence, &c. it shall be aided by verdict. *R. 2 Jon. 40.*

In case against officer for removing goods taken in execution before the landlord is paid a year's rent, want of alleging notice of rent due shall be aided by the verdict. *Palgrave v. Windham*, M. 6 G. Str. 212.

So, an allegation of a right to elect for 200 years and more, is sufficient after verdict, though it is not said, from time whereof, &c. *R. 2 Jon. 145.*

If the plaintiff declares on an *assumpsit*, against an executor, to pay 50s. when he receives money, and avers that he received money, without saying that he received 50s. it will be good after a verdict for the plaintiff. *R. 1 Mod. 169.*

In an action upon the case for not bringing goods sold to the common beam, it shall be aided after verdict, though he does not say that the goods were sold by weight. *R. per three J. 3 Mod. 162. Carth. 7.*

In *assumpsit*, in consideration that he assigned goods taken in execution, to the defendant, to pay the plaintiff, *de et ex bonis prædict.*, all his interest and costs, though he does not aver, that the defendant has raised the money *de et ex bonis*, it shall be aided after a verdict for the plaintiff. *R. Sho. 308.*

In *rescous* of goods, without saying what goods, it shall be aided by a verdict, which finds two horses. *Ow. 123.*

In *assumpsit* by an indorser against the drawer, if the declaration alleges that B. paid the money on the part of the plaintiff, without saying to whom, after a verdict for the plaintiff, it shall be intended that the payment was to an indorsee, and not to a stranger. *R. Carth. 130.*

So, if an ejectment be for land in A., but by deed it appears that the land lies in A. B., if the verdict finds a demise of *tenementa prædict.*, this aids the declaration. *R. Yel. 101.*

In waste upon a lease by husband and wife, not saying by deed, if it is necessary to be by deed, it shall be aided, if the verdict finds a lease by them by deed. Sal. 111.

So, in debt for rent for three years on a demise for a year *et sic de anno in annum*, without saying that he continued in possession for three years, for, after a verdict, it must be intended. R. 1 Sid. 423.

So, in *assumpsit* by an executor, if the plaintiff does not aver, no payment to the testator, &c. it shall be aided. R. 1 Vent. 119. R. Hard. 221.

Or, on an *assumpsit* by A. and B., where the action is brought [\*] against A., the survivor, if the plaintiff does not aver, that B. did not pay. Per Hale, Hard. 221.

So, in *trover* against husband and wife, alleging a conversion *ad usum ipsorum*; if the verdict finds the wife not guilty, this aids the declaration. R. Mar. pl. 134.

So, in an action for words by both. R. 1 Rol. 781. l. 50.

So, in *assumpsit* to pay the costs in such a suit, if the plaintiff does not show how much costs, it is aided after verdict. R. Cro. El. 276.

So, in covenant by an executor for rent in the *detinet*, if he does not show whether due before or since the death of the testator, it shall be aided after verdict; for being in the *detinet*, it shall be intended before his death. R. 1 Sid. 376.

In *assumpsit* to pay, if the plaintiff drains land *ita quod*, it be dry *aliquo tempore* between such feasts, if the plaintiff alleges that it was dry *aliquo tempore*, whereas it should be *toto tempore*, it shall be aided after verdict for the plaintiff. Semb. 2 Rol. 246. l. 30.

So, in assault and battery by the husband and wife for a battery of both, it will be aided, if the verdict finds the defendant guilty only of a battery of the wife. R. 2 Mod. 66. 2 Lev. 101. Vide Action, (G).

So, in trespass by them for a battery of the wife and taking the goods of the husband, if the defendant be found not guilty as to the goods. Dub. 1 Lev. 3. Per two J., but two J. cont. Pal. 339.

In *assumpsit* for money received by the defendant for the plaintiff to the use of the defendant, after verdict it will be good; for the words, to the use of the defendant, being repugnant, and insensible, shall be rejected. R. 1 Sal. 24.

So, false Latin will be aided by verdict. 2 Mod. Ca. 380.

So, if the declaration shows a title imperfectly, it may be aided by verdict; as, if the plaintiff says that he is *tenens custom. qui tenet tenementa, &c. parcell. manerii per cop. rotulor.*, without saying *ad voluntatem domini*; it shall be intended after verdict that he was a copyholder. R. 1 Sal. 365.

A title defectively set forth is good after verdict, but not a defective title. Bolton v. Carlisle, C. P. M. 34 Geo. 3. 2 H. Bl. 261.

A verdict will aid an ambiguity of expression, but not the omission of the gist of the action. Cowp. 825.

After a verdict, those facts alone can be presumed to have been proved, which either are expressly or impliedly alleged. 1 T. R. 141.

After a verdict, the presumption is, that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. 1 T. R. 545. 704.

After verdict every thing shall be intended to have been proved which the allegations of the record require to be proved; but nothing more. 3 T. R. 25, 26. 3 Burr. 1725.

A verdict will cure a defect in the mode of stating a title, but not one in the title itself. 4 T. R. 470. 2 Burr. 1159. Dougl. 683.

[\*96]

If counts are misjoined, thus, six in *tort*, and four in *assumpsit*, and the verdict be taken on those counts only, which are well joined, the fault is cured; nor will the judgment be arrested. 2 M. & S. 533. over-ruling. 3 Lev. 99.

A discontinuance by the defendant as to part of the demand, is aided by verdict. 1 H. B. 644.

After a verdict, consideration will be presumed, either the same as laid, [\*] or a good one. Lofft, 465. But here, held, with some hesitation, that the uncertainty in a declaration for non-delivery of an article sold, stating the consideration to have been a certain quantity of oil, and the thing sold a certain horse, and without adding the prices, was cured by verdict. 2 B. & P. 265.

I. in an action by the reversioner, the injury be so described as that proof of an injury to the possession would entitle him to a verdict, judgment will, after verdict, be arrested. 1 M. & S. 234.

A plea claiming a prescriptive right, as appurtenant to land, stating that the owners in fee of the land, &c. have been used and accustomed, and of right, ought, &c. not adding, from time immemorial, upon which issue is taken and found for the claimant, is aided, since without proof of immemorial usage he could not have succeeded. 3 T. R. 147.

A *colloquium* of the death, a charge of "being guilty," innuendo of the murder of A. Comp. 275.

Where the inventor of an article is entitled to a monopoly therein (here under stat. 34 Geo. 3. c. 23.), upon compliance with certain conditions, for a certain time, in an action for an infringement of his right, an averment that the defendant invaded it within the period, and while the plaintiff was proprietor, and entitled to the monopoly, supplies, after verdict, the want of a specific averment that he had complied with the conditions. 7 T. R. 518.

If the crown in *quare impedit* does not allege presentation, it is cured by verdict. Rex v. Bishop of Landaff, H. 8 G. 2. Str. 1006.

So in an action of debt in a manor-court of an amerciament, if the declaration does not show that defendant was resident at the time of the amerciament set, it is aided by verdict. Wicker v. Norris, P. 3 G. 2. B. R. H. 116.

If defendant makes defence on a writ of inquiry, he cannot afterwards take advantage of mistake in the declaration. Freeland v. Hunt, P. 3 G. 3. 2 Wils. 380.

Although declaration begins, whereas, and nothing is averred, and would be bad on special demurrer, yet the conclusion, by reason whereof, is an averment, and after verdict the defect is aided. Barnes, 452.

In action on 9 Ann. c. 14. if the parish where the offence is committed is not specified, it is cured by verdict that defendant owes to the poor of the parish of A, Frederick v. Lookup, H. 7 G. 3. 4 B. M. 2018.

But, if the verdict falsifies the declaration, the plaintiff shall not have judgment; as, in conspiracy if he finds all, but one, not guilty. 1 Sand. 230.

So, if the declaration does not contain a cause of action, it shall not be aided; as, in *assumpsit*, if the promise alleged does not appear to be made upon good consideration, it shall not be aided by verdict. R. 1 Sal. 364.

In *assumpsit*, a consideration shall not be presumed after a verdict, if it appears on the face of the declaration to be illegal. Stotesbury v. Smith, H. 33 G. 2. 2 B. M. 924.

< In what instances, the want of an averment, after verdict, shall be intended to have been supplied by proof, and what defects will be cured by verdict. Owens v. Morehouse, 1 Johns. Rep. 276. Thomas v. Roosa, 7 Johns. Rep. 461. Duffie v. Hayes, 15 Johns. Rep. 327. Bartlett v. Crozier, 15 Johns. Rep. 250. Livermore v. Boswell, 4 Mass. Rep. 437. Hall v. Crandall, Kirby, 402. Chestnut Hill Turnpike Co. v. Rutter, 4 Serg. & Rawle, 6. Thompson v. Musser, 1 Dall. 458, 461. Brown v. Barry, 3 Dall. 365. Pate v. Bacon, 6 Munf. 219. Hawkins v. Walker, 4 Bibb, 202.

A declaration which sets out a bad title, is not cured by verdict; but if a good

title be defectively set out, a verdict will cure the defect. *Stilson v. Tobey*, 2 Mass. Rep. 521. *Avery v. Tryingham*, 3 Mass. Rep. 160. *Wells v. Prince*, 4 Mass. Rep. 67. *Moor v. Boswell*, 5 Mass. Rep. 306. *Kingsley v. Bill*, 9 Mass. Rep. 198.

A declaration in trespass for entering the plaintiff's house, and taking and carrying away his goods, and for assaulting, terrifying, and falsely imprisoning his wife, is good after verdict, and the injury to the wife shall be considered as matter of aggravation only. *Heminway v. Saxton*, 3 Mass. Rep. 222.

After verdict, the court will presume, that every thing was done at the trial, which was necessary to support the action, unless the contrary appear upon the record. *Carson v. Hood's Exrs.* 4 Dall. 108. >

When a defect in a declaration shall be amended, vide Amendment, (L 1, 2.)

How it shall be amended, vide ante, (C 6.)

#### (D) IMPARLANCE.

##### (D 1.) What it is.

Imparlance is, when the court gives leave to a party to answer at another time, without the assent of the other party.

[\*]Imparlance is general or special.

Special imparlance is, where the party imparls, *salvis sibi omnimod. advantage*.

An imparlance so special as to save all exceptions to the jurisdiction of the court cannot be entered without the leave of the court. 2 Bl. 1094.

General, is where the party imparls generally without exception.

And in C. B. it shall be at the return-day.

In B. R. at a day certain, viz. the day of appearance after the return.

The defendant may pray an imparlance to plead to the declaration.

So, the plaintiff to reply.

So, to rejoin, sur-rejoin, &c.

Imparlance may be to another time in the same term.

Or, to the next term.

But it cannot be omitting a term; as, from Hilary to Trinity term. R. 2 Rol. 442.

In B. R. on a declaration of Hilary, there may be an imparlance to Trinity term; for it is the course of that court to give imparlance on declaration till the day of pleading. *Fletcher v. Richardson*, M. 10 Geo. 2. B. R. H. 322.

In personal actions, if the defendant does not appear at the day given by the imparlance, there shall be final judgment against him; for no process lies to bring him into court. Mod. Ca. 5.

Though the imparlance be prayed upon a plea in abatement. Ibid.

Though it be prayed by the plaintiff. Ibid.

Though the imparlance be to another term, or to another day in the same term. Mod. Ca. 8.

Time to plead is the same as an imparlance. Barnes, 345.

##### (D 2.) When it shall be given.

In all real actions the defendant shall have an imparlance of course. C. Att. 204.

No, in all actions in B. R. where the defendant is taken on a *latitat*; for the cause of action does not appear by the writ. Vide C. Att. 38.

No, if he appears on a special original, or summons, as a member of parliament. 2 Mod. Ca. 228.

[\*98]

So, in C. B. if the defendant be taken on a *clausum fregit*, and the plaintiff declares thereon specially, the defendant may plead in the same term, or have an imparance. (Vide C. Att. 294.)

So in ejectment and personal actions in C. B., or by original in B. R. in London or Middlesex, if the defendant appears *cras. ascens.*, or the last return of any other term, he shall have an imparance of course. (Vide C. Att. 295. 347.)

So, where the action lies in any other county, if the defendant appears *cras. mart. or mens. paschæ*, or afterwards, or after the first return in any other term. (Vide C. Att. 295. 347.)

It shall be granted, though writ returnable on first return, if declaration was not delivered with notice to plead. Barnes, 225.

So, if the defendant appears the first term, but does not give a rule to declare, he shall be compelled the second term to accept of a declaration with an imparance. C. Att. 294. 346.

So, since the stat. 4 & 5 W. & M. 21. on a declaration delivered to [\*]the defendant in custody before *mens. pas. or cras. animar.*, in actions not brought in London, Middlesex, or within forty miles distance, if the defendant enters his appearance within ten days after Easter or Michaelmas term, he shall have an imparance till the next term. (Vide Rules and Orders B. R. 58. 85. Mills, 114.)

So, where the action is in any county, if the declaration be delivered upon or after *mens. pas. or cras. animar.*, or at any time in Hilary or Trinity term, and the defendant enters his appearance two days before the essoign-day of the next term. (Vide Rules and Orders B. R. 58. 85. Mills, 115.)

So, if the plaintiff declares, and does not demand a plea within three terms, the defendant shall have an imparance of course. 2 Rol. 46.

If notice of declaration is served on Sunday, imparance shall be granted. Barnes, 309.

If defendant is lunatic, there be imparance. Barnes, 225.

In action for words, defendant shall have imparance, on affidavit of plaintiff's being under prosecution for the offence. Barnes, 224.

On an amendment, defendant shall have an imparance or costs, at his election. *Lechill v. Reynell*, T. 6 G. Str. 950.

If plaintiff has a rule to file bill to warrant proceedings, he may enter imparance on roll; but if not entered in time, he pays costs. Barnes, 227.

### (D 3.) When not.

But, if the appearance in actions by original in London or Middlesex be before the last return of the term, or in any other county before *cras. mart. or mens. pas.*, or upon the first return of Trinity or Hilary term, the defendant shall not have an imparance without consent or special rule; but upon a rule given he ought to plead the same term, or within fourteen days after the term. Vide C. Att. 294, 295.

So, in B. R., if a declaration in London or Middlesex be delivered before *mens. pas. or cras. animar.*, the defendant shall plead the same term without imparance. By rule in B. R. 5 Ann. (Vide Rules and Orders B. R. 72, 73.)

If a declaration be against an attorney, or officer of the court, he shall plead without an imparance, if there are four days within the term after the bill is filed. Sal. 517.

On process returnable the first, second, or third return of any term, if declaration is delivered within four days before the end of the term, defendant shall plead without imparance. General rule, C. B. T. 3 Geo. 3. 3 Wils. 381.

On all process sued out of this court, returnable the last return of any term, if the



plaintiff declares in London or Middlesex, and the defendant lives within twenty miles of London, the defendant shall plead within four days after such declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return, or on the day next after the same, unless such return day shall happen on a Saturday, in which case the plaintiff shall have the whole of the Monday following to file or deliver such declaration as aforesaid. And in case the plaintiff declares in any other county, or the defendant lives above twenty miles from London, the defendant shall plead within eight days after the declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be [\*]filed or delivered as aforesaid. Reg. Gen. C. P. H. 35 Geo. 3. 2 H. Bl. 383.

So, he shall plead in the same manner, when the appearance upon process is voluntary, as, if he was arrested upon process. Sal. 518.

So, if he in reversion be received on the default of tenant for life, he shall not have an imparlance; for the plaintiff is delayed by the receipt. Mo. 34.

So, in an action by or against an attorney of the court, the defendant shall not have an imparlance. Pr. R. 180.

Nor, where the defendant comes in upon an outlawry, and the plaintiff declares against him. Ibid.

So, for cause, the court may force the defendant to plead the same term without an imparlance; as, in an action against an executor, who would confess the actions of others to defeat the plaintiff. R. 1 Bul. 122.

So, in assize, no imparlance shall be given without special cause. 1 Sal. 83.

The defendant shall not be allowed an imparlance, or a motion to amend his plea, or change the venue, before his appearance is entered with the proper filazer. By rule Pas. 24 Car. 2.

After appearance by attorney, and special imparlance, a plea to the jurisdiction of the court cannot be pleaded. 2 Bl. 1094.

But after a special imparlance, misnomer may be pleaded in abatement. 1 Bl. 51.

If *habeas corpus* removes a cause from sheriff's court to B. R. Nov. 6., and declaration is delivered Nov. 12. and rule to plead given, the court will not grant imparlance. Wood v. Wenman, M. 20 G. 2. 1 Wils. 156.

The defendant is not entitled to an imparlance, where the plaintiff is prevented from declaring before the essoign day, by an essoign cast. 2 T. R. 16.

In trover for goods, where the defence is, that they were sold by the plaintiff, the court will give the defendant time to plead, in order that he may have time to obtain a discovery in the court of chancery. Whitter v. Cazalet, B. R. M. 29. G. 3. 2 T. R. 688.

A writ was returnable the last day of one term, and bail were justified on the fourth day of the next, before the essoign day, of which no declaration *de bene esse* was delivered: held, that as the plaintiff had not been guilty of laches, by not declaring *de bene esse*, the defendant was not entitled to an imparlance. 5 T. R. 372.

Though the plaintiff does not declare until the term following that in which the cause has been duly removed from an inferior court by the defendant: the defendant is not entitled to an imparlance. 6 T. R. 752.

Since a plaintiff is not bound to declare *de bene esse*, his omitting to declare before the essoign of a term will not entitle the defendant to an imparlance. 2 B. & P. 126.

Where a writ is returnable the last return of one term, and the defendant does not justify bail till the first day of the next term, he is not entitled to an imparlance, though the plaintiff do not deliver a declaration *de bene esse*, till after the essoign day of the second term. 1 Mars. 587. 6 Taunt. 261.

On declaration in covenant, running to great length, exchequer will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea. 2 Price, 114.

[\*100]



A special imparlance, saving and reserving all advantages and exception [\*] whatsoever can only be had by leave of the court, upon motion within the four days. 2 Blk. 1094.

The plea of *solvit ad diem* cannot be entered in the general issue book ; and if a defendant, who is entitled to an imparlance, enter it there, it operates as a waiver of the imparlance. Lockhart v. Mackreth, B. R. T. 34 G. 3. 5 T. R. 661.

Not in real actions. Barnes, 2.

Not after a peremptory rule to plead. Barnes, 225.

Nor, if notice to plead has been served, though not indorsed on the declaration. Barnes, 226, 227.

When plea may be after imparlance or not. Vide Abatement, l. 19, 20.

### (E) PLEA.

A plea shall be in abatement, or in bar.

As to pleas in abatement, vide Abatement per tot.

As to pleas to a bill in equity, vide Chancery, (11.)

The court will oblige a defendant to entitle his plea, as of the day on which it is filed. *instead of the term generally*, only where injustice would otherwise ensue, or where he has foregone the privilege of pleading it by unnecessary delay ; not, therefore, where he files a plea *puis darrein* continuance after the day, in bar, of a matter which has arisen between the verdict and that day, but which plea he did not file sooner because a rule for a new trial was depending, which, had it been granted, the plea would have been unnecessary. 3 T. R. 554.

A defendant must plead as of the term when he ought to have appeared, according to the exigency of the writ with which he has been served. 3 T. R. 627.

The extent and meaning of a special plea is to be collected from the introduction. 6 T. R. 565.

If the general issue and a special plea be pleaded, and the latter, commencing as an answer to part only of the demand, answers the whole, it is bad on a special demurrer. 2 B. & P. 427.

< In replevin, property in a stranger, may be pleaded in bar, or in abatement. Harrison v. M'Intosh, 1 Johns. Rep. 380.

So as to the plea of alien enemy. Bell v. Chapman, 10 Johns. Rep. 183. Vide Levine v. Taylor, 12 Mass. Rep. 8. Hutchinson v. Brock, 11 Mass. Rep. 119. >

### (E 1.) Must answer the whole declaration.

A plea in bar must be conformable to the count. Co. Lit. 303. a. Vide post, (F 4.)—(Q 3.)—(W 2.)

And therefore, if the plea does not answer to every part of the declaration, it is a discontinuance for the whole ; as, in trespass for cutting down 300 trees, if the defendant pleads, *quoad* all but the entry and cutting down 20 trees, not guilty, and *quoad* the entry justifies, but says nothing to the cutting down of the 20 trees : this is a discontinuance for the whole. R. 4 Co. 62. a.

So, in trover for 300 sheep, if the defendant justifies *quoad* 296, but says nothing as to the remaining four, it is a discontinuance for the whole. R. Cro. El. 434. Vide 2 Mod. 259.

So, in trespass with horses and sheep, if he justifies only with horses. R. Mar. pl. 47. R. 2 Cro. 27.

So, in covenant to provide 200 men and pay so much for every one, if the plaintiff assigns a breach in both points, and the defendant pleads only as to the providing of men, and says nothing to the nonpayment. R. 1 Lev. 16.

So, in debt on a bond to perform an award, if the defendant pleads performance only of part, it is bad. R. 3 Lev. 24. Vide in Arbitrament, (I 4.)

[\*] In account as bailiff of his house and goods, if he pleads only as to the goods. R. 2 Leo. 195.

In trespass for breaking his close and destroying his hop-poles, if the defendant pleads his freehold, and he took the hops, damage feasant, it is bad; for this does not answer to the destruction of the poles. R. 2 Mod. Ca. 330.

So, in trespass for a battery and wounding, if the defendant justifies the putting of him into the stocks, and says nothing more, it is bad; for that matter does not go to the wounding. R. Cro. El. 268.

So, in trespass for an assault and battery, if the defendant, as to the *vi et armis*, pleads not guilty, and *quoad residu. transgressionis* justifies by the taking his hat off his head in a church, it is bad; for this does not go to the battery. Sembl. but Cur. cont. 1 Sand. 14. R. 2 Vent. 193.

So, in trespass for an assault and imprisonment, if to all, *præter* the assault and imprisonment, the defendant pleads not guilty, and *quoad* the imprisonment justifies, without saying any thing to the assault, it will be bad, though there cannot be an imprisonment without an assault. R. 1 Rol. 176, 7.

In trespass for entering a close and taking timber, if the defendant makes a title to the close without answering to the timber. R. 1 Rol. 406.

In trespass for driving away his cow if the defendant justifies the taking of plaintiff's heifer; for they are different. R. Lut. 1355.

So, in trespass with a *continuando a 1 die M. ad. 25 Jul.* if the defendant justifies except *a 1 die M. ad. 20 Jul.* R. 2 Cro. 27.

So, the defendant ought to allege the matter of his plea in the same place that the declaration mentions, if the justification is not local. Vide Action, (N 12.)

If the plea begins; and the said A. B., who is sued by the name of C. D. it is bad; for A. B. is not named in the declaration: it should also say by whom he is sued. Jackson v. Ford, P. 31 G. 3. 3 Wils. 413.

But if he answers in sense, though not in words, it is sufficient; as, if a bond be to perform all covenants, agreements, articles, &c., and the defendant pleads that he has performed all covenants and agreements, it is good; though he omits (articles) for (agreements) is tantamount. R. Cro. El. 255.

So, in trespass for an imprisonment till he paid so much, if the defendant justifies the imprisonment, it is sufficient, without answering to the taking so much, which is only aggravation. R. 1 Sal. 408. Ray. 469.

So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; and therefore a justification as to the breaking and entering will cover the whole declaration. 3 T. R. 292.

Or, for an assault, battery, and menacing, if he justifies the assault without answering to the menaces, which is aggravation. R. Mo. 705.

So, in trespass for an assault, battery, and imprisonment, if he justifies the trespass and imprisonment, it is sufficient. R. 1 Lev. 31.

Or, pleads *quoad* the residue of the trespass and imprisonment; for trespass goes to the whole. R. 3 Lev. 404.

So, in trespass *quare clausum fregit et januas rupit et clausum intravit*, [\*] if he pleads to all but the breaking, not guilty, and then justifies his entry by process, &c., it is sufficient; for the entry is a breaking in law. Semb. Lut. 1433. R. Latch. 188.

So, in trespass *quare clausum fregit* and so many cart loads of timber *cepit*, if he makes title to the close, and shows the timber to be trees growing, it is sufficient. R. 1 Rol. 406.

[\*102] [\*103]

But by the stat. 32 H. 8. 30. after verdict, a discontinuance shall be amended. R. 2 Rol. 161. R. 4 Mod. 246.

And so it was by consent. 4 Co. 62. a. Vide Amendment, (I).

Yet it shall not be amended, or aided on a general demurrer. Semb. Yel. 85. 1 Sand. 338, 339.

If the plea begins by answering only to part, the plaintiff ought to take judgment by *nil dicit*, to avoid a discontinuance. 1 Sal. 179, 180.

If it begins as an answer to the whole, but answers only to part, it will be bad on demurrer. a.

On a writ in debt for 1066*l.*, plaintiff declared for 1000*l.* borrowed by defendant of plaintiff, and in a second count for 66*l.* for interest of money lent by plaintiff to defendant. Defendant pleaded in abatement of the writ, that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff," was borrowed by defendant and others, and not by defendant separately. On special demurrer, because this plea answered only one of the causes of action, (that mentioned in the first count,) the court held the plea bad. *Herries v. Jamieson*, B. R. E. 34 Geo. 3. 5 T. R. 553.

And in a plea of justification to an action for a libel, each particular charge must be justified. *Riggs v. Denniston*, 3 Johns. Cas. 198. Vide *Van Ness v. Hamilton*, 19 Johns. Rep. 349. *Sterling v. Sherwood*, 20 Johns. Rep. 204.

So in replevin, if, to a plea of property in a stranger, the defendant reply, that the plaintiff entered the house in the night time, it is bad. *Harrison v. M'Intosh*, 1 Johns. Rep. 380.

So in debt for an escape, against the sheriff, the defendant pleaded, that the prisoner, inadvertently, and without any intention to escape, went into an office sixteen feet beyond the liberties, and returned in one hour, the plea is bad, in not stating a return before suit brought, and thereby avoiding the previous admission of an escape. *Bissell v. Kip*, 5 Johns. Rep. 89.

Where a plea commences as an answer to the whole declaration, but answers only a part, it is bad. *Nevins v. Keeler*, 6 Johns. Rep. 63. *Hallett v. Holmes*, 18 Johns. Rep. 28. *Van Ness v. Hamilton*, 19 Johns. Rep. 349.

So, a plea in bar to an action of debt or bond, admitting the plaintiff's right to recover a part of the penalty, is bad. *Fitzgerald v. Hart*, 4 Mass. Rep. 429. }

## (E 2.) And must not be double.

So, if a plea contains duplicity, and alleges several distinct matters (which require several answers) to the same thing, it is bad. Co. Lit. 303. a. 304. a. Hob. 295. Vide ante, (C 33.) Post, (F 16.)

As, if an avowant alleges seisin of services in his grandfather, and also in himself, it is double; for either is traversable, and one had been sufficient. Pl. Com. 140. a.

So, if a man alleges two continual claims, one by his ancestor, and the other by himself. Ibid.

Or, two descents in fee. Ibid.

So, if a man pleads a patent, as a grant and also as a confirmation, it is double. R. on demurrer. 1 Sid. 176.

So, in debt for rent, if the defendant pleads that it was a navigable river, and that the plaintiff had no right to demise the toll of it, it is double. R. by three J. vent. cont. for one is a consequent of the other. 2 Vent. 68.

*Nil debet* to part, and *nil habet in tenementis* to other part; for *nil debet* admits the demise. R. 4 Mod. 254. R. 1 Sal. 218.

So if the defendant pleads matter in law, and also matter in fact; as, if he says that S. lies within the Cinque Ports, where *breve domini regis non currit*, and does not lie in com. cant. R. Yel. 13.

If he pleads several outlawries in disability of the plaintiff; for one is sufficient. R. Carth. 9.

So, if he pleads not guilty to part, and justifies for the same part. R. 1 Rol. 49.

So, if he pleads several matters together, though one be in bar and the other in abatement. D. 1 Sid. 176.

[\*]And a double plea is bad, though one matter or the other be not well pleaded; as, in trespass, if the defendant pleads *molliter manus imposuit* and a release, it is double, though the release is not well pleaded. R. 1 Sid. 176.

Though but one of the several matters pleaded be material. Per Dod. Poph. 186.

But it is not double, where one matter alleged is a consequence of the other; as, if the defendant pleads *plene administravit* and so nothing in his hands. Pl. Com. 140. a.

Or, is pleaded only as inducement to the other. Per Holt, H. 10 W. 3. Poph. 186.

As, in *detinue* by a woman, if the defendant pleads that she took husband who released; for he cannot plead the release of the husband without showing that the plaintiff married him. R. Mo. 25. Dal. 30.

In debt on a bond to deliver hops which the plaintiff was to choose, if the defendant pleads that he was ready, but the plaintiff did not choose, it is not double. Semb. Mar. pl. 113.

And though a plea contain many parts, yet if it form one connected proposition, it is not double. 2 Bl. 1022. 1028.

So, it is not double, if one answer is sufficient for the several matters; as, if the defendant alleges two descents in tail; for the gift is the substance, and *ne dona pas* is an answer to the whole. Pl. Com. 140. a.

In trespass for an assault, battery, and imprisonment till he paid 7*l.* fine; if the defendant pleads not guilty for all but the assault and imprisonment, and then justifies by process for 7*l.*, it is not double; for the taking of the 7*l.* is not within the not guilty. R. Jon. 367.

So, it is not double where a matter is added only for the maintenance of the count or bar; as, in *quare impedit*, if the ordinary pleads, that he presented on a lapse, and the plaintiff replies, that he presented before a lapse, and the ordinary refused, and afterwards presented his clerk on pretence of a lapse; for that matter, that the ordinary presented on pretence of a lapse, is alleged only to maintain the disturbance mentioned in the count. Hob. 198.

So, it is not double, if one matter cannot be well pleaded without the other, and he relies upon one; as, if two statutes are pleaded for the repeal of a former law, if the one has reference to the other. Semb. 1 Rol. 88, 89.

So, if a man pleads a feoffment with warranty, and relies only on the warranty. Per Berkley, Mar. pl. 84.

If the defendant pleads several matters, and concludes *et sic non est factum*. Kit. 223. b. 224. a.

If the defendant pleads, that the principal rendered himself and died, and relies on the death. R. Jon. 139.

If he pleads, *nient alien artificer*, and relies upon his being born within the king's ligeance. R. 1 Sid. 357.

In *detinue*, if the defendant pleads that the plaintiff married after bailment, and the husband released to him. R. Mo. 25.

But the defendant may plead one matter to part, and another matter in bar to other part. Co. Lit. 304. a.

As, in dower, the tenant may plead joint-tenancy to part, and detain of charters to the residue, though this goes to the whole. Kit. 223. b.

[\*]In assize, a fine as to a moiety, and a release of the father with warranty as to the other moiety. Ibid.

In trespass for an assault, battery, and wounding, the defendant may plead not guilty to the wounding, and justify the assault and battery. Mar. pl. 106.

So, in trespass for breaking his house, &c., the defendant may plead as to all the trespass, *præter* three posts, not guilty, and as to the breaking the three posts, the defendant may justify; for though he pleads not guilty to all the trespass in the house, yet it is with an exception of the three posts. R. Cro. El. 87.

And one tenant or defendant may plead a matter which goes in bar to the whole, and the other tenant or defendant may plead another matter in bar to the whole. Co. Lit. 303. a.

So, if a plea is double, and the plaintiff by his replication answers only to one matter and takes issue upon it, which is found, this aids the duplicity of the plea. Kitt. 238. a. Vide when a bar is aided by the replication, post, (E 37.)

And a double plea shall be aided upon a general demurrer. R. 1 Sand. 337. R. 2 Rol. 336. Semb. 1 Rol. 112. Vide when an unnecessary traverse, which makes the plea double, shall be aided on a general demurrer, post, (G 22.)

And therefore there was a special demurrer to it. Cro. Car. 61. 2 Vent. 68. Mar. pl. 113.

So, if an assignment of errors be double, there ought to be a special demurrer; for a general demurrer is not sufficient. R. 1 Lev. 76.

And by the st. 4 & 5 Ann. 16. the tenant or defendant in any action, or plaintiff in replevin, in any court of record may, with leave of the court, plead as many several matters as he shall think fit. But if any such matter shall be judged insufficient, costs shall be given at the discretion of the court. So, if on an issue in any such matter verdict be for the plaintiff or demandant, costs shall be given, unless the judge certifies he had a probable cause to plead it.

It is in the discretion of the court whether they will allow several pleas to be pleaded. 5 T. R. 97.

The stat. 4 Anne, c. 16. s. 4. giving power to plead several matters, does not extend to actions at the suit of the king. Forrest, 57.

Leave to plead several matters must be given in court, not at judge's chambers. Barnes, 357.

In the C. B. several pleas cannot be pleaded without the special leave of the court. 3 T. R. 560.

Defendant may plead three pleas. Verney v. Fox, T. 5 G. 2. Fort. 337.

If defendant plead double, it must be at one and the same time. Hall v. Tullie, P. 8 G. Fort. 336.

Defendant may have leave to add a plea after two terms since pleas pleaded; for there is no time limited. Waters v. Bovel, T. 21 & 22 G. 2. 1 Wils. 223.

On motion to plead double, the court will not take into consideration whether it be a good plea or not. B. R. H. 126.

The court will, on circumstances, give leave to withdraw a plea, and plead another, (as on a bond to withdraw *non est factum*,) and plead the statute of gaming on payment of costs, taking short notice of trial, and giving judgment of the same term, if ver-



dict for plaintiff. *Jeffreys v. Walter*, M. 21 G. 2. 1 Wils. 177. *Nichols v. Sutcliffe*, T. 7 G. 2. B. R. H. 56.

[\*]So, on false imprisonment defendant having pleaded general issue, may plead a justification, and the general issue, on terms. *Taylor v. Joddrell*, M. 23 G. 2. 1 Wils. 254.

And if in parliament, on waiving privilege. *Wilkes v. Wood*, *Wilkes v. Webb*, M. 4 G. 3. 2 Wils. 204.

The court will, on circumstances, give leave, after general issue pleaded, to plead a special plea, which brings it on upon the merits; but not a plea that excludes the merits, as the statute of limitations. *Cox v. Rolt*, M. 5 G. 3. 2 Wils. 253.

Defendant may move to plead double, after rule to plead is out, and before judgment. *Barnes*, 329.

After rule to plead is out, defendant cannot have leave to plead performance on a bond, and also such administration not granted to plaintiff; for that cannot be pleaded without craving *oyer*, which cannot be craved after the rule to plead is out. *Garrard v. Early*, T. 9 G. 3. 2 Wils. 413.

Defendant may plead double, after order to plead issuable plea. *Barnes*, 338.

If defendant pleads the general issue, plaintiff demurs, and defendant joins; the court may give leave to withdraw his plea, and plead double. *Meard v. Philips*, T. 5 G. 2. Str. 906.

The court of K. B. under special circumstances, will rescind the rule to plead double. 13 East, 225.

Separate pleas are as distinct and unconnected as if upon separate records. So that the insufficiency of one cannot be supplied by another. 1 T. R. 118.

Where two pleas to the whole declaration are filed at different times on the same day, the plaintiff may act upon that last filed, and sign judgment, if it warrants him. 3 Taunt. 386.

Defendant in *qui tam* cannot plead double. *Morgan v. Lookup*, T. 9 G. 2. Str. 1044. B. R. H. 262. *Law v. Crowther*, P. 28 G. 2. 2 Wils. 21.

So, action on 9 Ann. for money won at play, is not within 4 Ann.; so two pleas cannot be pleaded. *Barnes*, 365.

If defendant pleads several pleas, without saying by leave of the court, it is only irregularity, but is good on special demurrer; and any duplicity of plea must be pointed out by the demurrer. *Ryley v. Parkhurst*, T. 21 & 22 G. 2. 1 Wils. 219.

Defendant must show that all the pleas pleaded were by leave of the court; therefore, if, in trespass, he pleads not guilty, and then, "by leave," &c. according to the statute, justifies, and concludes with averment, and then as to the second count justifies again; it does not appear that this second justification was by leave of the court, and it will be bad on demurrer. *Bartholomew v. Ireland*, H. 11 G. 2. Andr. 108.

Rule nisi to plead double, shall be discharged, if defendant has not appeared. *Barnes*, 331.

*Non assumpsit* and *ne unq. exec.* allowed without affidavit. *Haggard v. Collington*, T. 2 G. 2. Fort. 336.

*Non assumpsit* and a recovery and execution executed, as to part of the debt, allowed. *Levat v. Resherè*, M. 4 G. Fort. 337.

In *indeb. assumpsit*, *non assumpsit* and *plene administravit*, allowed on affidavit. *Ld. Bristol*, M. 1724, Bunb. 182.

*Non assumpsit*, and *non assumpsit infra sex annos*, allowed. *Harrison v. Winchombe*, H. 12 G. *Folkes v. Smith*, in C. B. M. 12 G. *Bristow v. Woodward*. *Toepfen v. Elking*, M. 13 G. Str. 678. Allowed on solemn debate; because hereby defendant secures to himself a trial on the merits at all events. *Da Costa v. Carteret*, H. 4 G. 2. Str. 889.

*Non assumpsit* and discharge by bankruptcy, allowed. *Phillips v. Wood*, M. 3 Geo. 2. Str. 1000.

To *assumpsit*, testator made no such promise: cause of action not within six

[\*106]



years; executor made no promise, and *plene administravit*. *Hughes v. Pigot*, P. 9 G. 2. B. R. H. 243.

[\*]In trespass for cutting down plaintiff's tree, that he cut it down for repairs, and that it interrupted his watercourse, allowed. *Clare v. Frost*, P. 7 G. Str. 425.

On debt on bond against an administrator, *solvit ad diem* and *plene administravit*, allowed, on affidavit of the *plene administravit*. *Jones v. Lord Stafford*, M. 1724. Bunb. 181.

To debt on bond, executor may plead payment of principal and interest, according to st. 4 & 5 Ann. and *plene administravit*. *Anon.* 9 G. 2. B. R. H. 178.

*Non est factum*, and discharge by commission of bankrupt, allowed. *Atkinson v. Atkinson*, T. 4 Geo. 2. Str. 871.

Bankrupt allowed to plead his bankruptcy generally and specially. *Ld. Clinton v. Morton*, M. 8 G. 2. Str. 1000.

In debt on bond, to marry plaintiff if requested, allowed to plead *non est factum*; and never requested. *Dunn v. Vacher*, T. 5 G. 2. Str. 908.

On an information of debt on bond to the crown, *non est factum*, and conditions performed, allowed. *Attorney-general v. Snow*, H. 1721, Bunb. 96.

In replevin, *non capit*, property in another, and *liberum tenementum*, allowed. *Barnes*, 364.

In *quare impedit*, that he was seised in fee of advowson, and that he had the next turn, allowed. *Winchester v. Cook*, P. 3 G. 2. Fort. 337.

Where the king is plaintiff in *quare impedit*, the defendant cannot plead double. *Rex v. Hayes*, C. P. H. 18 G. 2. Willes, 533.

To a *scire facias* on an old judgment, terre-tenant may plead payment of the money recovered, and that defendant in that judgment was not seised. *Ellis v. Mortimer*, T. 8 G. 2. B. R. H. 153.

Not guilty, and *liberum tenementum*—in replevin, that plaintiff has no property, and justification—damage-feasant, and under demise from defendant to plaintiff—distress for damage-feasant, and rent in arrear—*solvit ad diem*, and mutual debt—*non assumpsit*, and discharge under debtor's act—*non est factum*, and such discharge—*non assumpsit* and *non assumpsit infra*, &c.—*plene administravit*, and set off—*non assumpsit*, and *plene administravit*—not guilty, and general release—not guilty, and money paid plaintiff in satisfaction of all trespasses to such a time—*ne unques executor*, and *plene administravit*—not guilty, and *molliter manus imposuit*, *son assault demesne*—*non est factum*, and *ne unques executor*—not guilty, *son assault demesne*, and satisfaction for all trespasses—not guilty and justification—*non est factum*, and duress—*non assumpsit*, set off and tender—tender to first count, *non assumpsit* to the residue—*non assumpsit* by testator, general *plene administravit*, and special *plene administravit*—in trespass, assault, and battery, not guilty and license—may be pleaded jointly. *Barnes*, 272. 275. 279. 286. 329. 336. 338, 339, 340. 343. 347, 348, 349. 352. 355, 356. 359, 360. 362, 363, 364, 365, 366.

*Non assumpsit* and statute of usury, refused. *Barnard v. ———*, H. 8 G. Fort. 336.

Bankruptcy and *non assumpsit*, refused. *Newman v. Chandler*, Fort. 336.

*Non assumpsit*, and *non assumpsit infra sex ann.*, refused *per cur.* Fort. cont. *Whelpdale v. Atkinson*, Fort. 337. *Vide supra*, contra.

*Non assumpsit* and a general release, refused. *Glover v. Heathcot*, Fort. 337. *Barnes*, 328.

*Non assumpsit*, and a tender, not allowed. *Baker v. Westbrooke*, P. 6 G. 2. Str. 949. *Vide* 2 Bl. 723.

A defendant cannot plead *non assumpsit* as to the whole, and a tender as to part. 3 Wils. 145. 2 Blk. 723. *Maclellan v. Howard*, B. R. H. 31 G. 3. 4 T. R. 194.

Neither can *non est factum*, and a tender as to part, be pleaded to an action on a bond. *Jenkins v. Edwards*, B. R. H. 33 G. 3. 5 T. R. 98. 4 Taunt. 459.

[\*]Leave to plead two pleas in an action on a deed made abroad, one whereof denies, and the other admits, the contract, will be refused. 3 Taunt. 385.

[\*107] [\*108]

*Solvit post diem*, and a discharge under an insolvent act, not allowed to be joined, being inconsistent. 2 Blk. 993.

*Non assumpsit* and alien enemy cannot be joined. 2 Blk. 1326. 1 B. & P. 222. 2 B. & P. 72.

*Non est factum*, and usury, may be pleaded together. 2 B. & P. 12.

To *assumpsit* on a bill of exchange, the court will not allow a defendant to plead the general issue; and that the bill was given on a stock-jobbing transaction, contrary to stat. 7 G. 2. c. 8. *Shaw v. Everett*, C. P. H. 38 G. 3. 1 Bos. & Pull. 222.

In trespass, not guilty; and a justification for a way; not allowed. Fisher's case, Fort. 335.

In trespass, tender of amends, and justification that plaintiff's fences were out of repair, not allowed. *Antony v. Williams*, T. 4 G. Fort. 336.

But not guilty and tender of amends have been allowed. 2 Bl. 1003.

If defendant in trespass, pleads in justification two titles, one by lease for lives, and one life living 12th July, and yet as to 12th July, another title and seisin in fee; it is repugnant and naught. *Taylor v. Woollen*, P. 2 G. 2. Fort. 330.

In assault and battery, *non est factum* and a justification cannot be pleaded. *Palmer v. Wadbrooke*, M. 4 G. 2 Str. 876.

To debt on bond, *non est factum* and coverture in plaintiff not allowed; for one is in bar, the other in abatement. *Holt v. Mabblerley*, T. 8 G. 2. B. R. H. 135.

*Liberum tenementum*, and justification or not guilty—not guilty, and accord and satisfaction—*non assumpsit*, and several set-offs—*nil debit*, and *nil habuit in tenementis*—not guilty, and justification in trespass—*non assumpsit*, and *non assumpsit infra*, &c. after money paid into court—[*non assumpsit* and alienage of the plaintiff] not guilty, and a release of particular trespass—not guilty, and tender—in trover, not guilty, and that plaintiff became bankrupt—*non assumpsit*, and infancy—*non est factum*, and *solvit post diem*—*non assumpsit* and *solvit ad diem*—cannot be pleaded jointly. Nor *non assumpsit*, and *plene administravit*—*solvit ad diem*, and *riens per descent*—not guilty, and a license—without affidavit. Barnes, 329. 332, 333. 338, 339. 350, 351. 359, 360. 363. 2 Bl. 905. 993. 1326.

But this statute does not extend to plead double matter, which shall have different trials: as, in dower, to plead *ne unques accouple* and a mortgage; for the first matter shall be tried by the bishop, and the other by a jury, and the judge cannot certify if there was a probable cause. R. inter Harding and Harding, C. B. M. 9 Ann. (Com. 148.)

In dower, leave to plead *ne unques seise*, and *ne unques accouple* denied. 2 Bl. 1157. 1207.

*Non assumpsit*, and *non assumpsit infra sex ann.* pleaded, to the second replication, an original, rejoinder, *nul tiel record*, judgment for plaintiff, and plaintiff executes writ of inquiry; afterwards the first issue of *non assumpsit* tried, and plaintiff non-suited, and thereupon, on motion, the writ of inquiry discharged; for if one issue be for defendant, plaintiff cannot recover. *Prior v. Ilay*, M. 8 G. 2. Fort. 338.

< *Nul tiel record* and *nil debet* cannot be pleaded to an action of debt on a judgment rendered in a sister state. *Le Conte v. Pendleton*, 1 Johns. Cas. 104.

Nor can *nul tiel record* be joined with a plea of payment; for *nul tiel record* cannot be joined with any other plea. *Carnes v. Duncan*, Coleman, 35. Vide *Raymond v. Smith*, 13 Johns. Rep. 329.

No, where in debt on bond, the defendant pleaded two pleas of payment; one before the day, and the other at the day, the court on motion ordered the first plea to be stricken out. *Thayer v. Rogers*, 1 Johns. Cas. 152.

A plea may contain a statement of all the facts necessary to constitute one defence, and is not, on that account, double. *Patcher v. Sprague*, 2 Johns. Rep. 462.

No, where, to a declaration in debt against the sheriff, for an escape, an involuntary escape, and return before action brought, and also a discharge under the act for the relief of insolvent debtors, were pleaded, it was held to be good, as constituting but one defence. *Currie v. Henry*, 2 Johns. Rep. 433.

So, to a plea of discharge, under the insolvent act, a replication setting forth all the reasons for which the discharge is made void by the act, in the words of the act, is bad; the plaintiff must specify the particular act or fraud on which he relies, in order to set aside the discharge. *Service v. Heermance*, 2 Johns. Rep. 96. Vide *Cooper v. Heermance*, 3 Johns. Rep. 313.

So a plea in trover, stating, that the goods were sold by order of the plaintiff, on commission, and also; that the defendant was discharged under the insolvent act, is bad. *Kennedy v. Strong*, 10 Johns. Rep. 289.

So, it would seem, that a plea to an action *de bonis asportatis*, alleging property in the defendant, and also a taking under a writ of replevin is bad for duplicity. *Moors v. Parker*, 3 Mass. Rep. 310.

But in replevin, the defendant may plead *non cepit*, and property in himself. *Shuter v. Page*, 11 Johns. Rep. 196. }

### (E 3.) Must not be argumentative.

So, a plea ought to be direct and positive, and not by way of rehearsal, or argumentative. Cp. L. 303. a. Mar. 207.

As, in trover for an indenture, whereby A. granted a manor, rendering rent, it is no plea that A. did not grant the manor; for it is no answer to the declaration, except by argument. R. Yel. 223, 4.

[\*]In ejectment on a lease for ten years, it is no plea, that by custom there cannot be a lease for more than six years. R. Dy. 357. b.

In *formedon* for a manor, if the tenant says that A. being seised levied a fine, &c.; it is not sufficient to reply, that *tempore finis* and at all times afterwards B. was seised, &c.; for this is an answer only by argument. Sav. 85, 86.

So, if a man pleads a grant by the king, he ought to plead directly, that the king *concessit*, and not by a *testat. existit quod concessit*. 1 Sand. 274.

Otherwise in covenant. Vide post, (2 V 2.)

If the defendant avows and says that A. was possessed, *et sic possessionat. per indenturam testat. existit* that he assigned, it is not good. R. 2 Sand. 319. 2 Lev. 12.

So, if the defendant pleads a lease, &c. by a *testat. existit*, it is bad. Cro. El. 195. 2 Cro. 537.

But an argumentative plea shall be aided by verdict, or on a general demurrer. Al. 48.

{ But it seems, that an argumentative plea is good on general demurrer: As where the averment was, that the defendant *had good reason to believe, that the plaintiff well knew* a certain fact, is argumentatively to charge the plaintiff with knowledge. *Spencer v. Southwick*, 9 Johns. Rep. 314. }

### (E 4.) Nor vary from the place in the declaration without necessity.

So, a plea in excuse or justification ought to allege the fact in the place mentioned in the declaration, if the nature of the justification does not otherwise require; and therefore in trespass at A., if the defendant justifies by an execution at B. in the same county, it is bad; for no place in the same county is material upon process to the sheriff. R. 3 Lev. 113.

In debt at London, on a bond to pay, if a ship did not miscarry, plea that it did miscarry at Falmouth in Cornwall, is bad; for the place is not material. R. 1 Lev. 149.

So, a plea that he made the bond in another county being within age, is bad. Dal. 18.

{ It seems, that the defendant, in an action for words, may justify at a different place from that laid in the declaration. *Thomas v. Rumsey*, 8 Johns. Rep. 26. Vide *Furman v. Haskin*, 2 Caines' Rep. 369. }

(E 5.) Must be certain.

So, a plea ought to be certain. And therefore, if the defendant pleads that he has expended 810*l.* for repairs *et alia onera necessaria*, it is bad for the uncertainty; for he ought to show for what charges he has expended them, by which the court may judge whether they were necessary or not. R. 1 Sand. 49. Vide *Certainty in the Declaration*, ante, (C. 17, 18, 19, 20, 21, 22.)

So, in debt upon a bond to make an assurance of land, if the defendant pleads, that he executed a release, it is bad, if he does not show that it concerns the same land. 2 Co. 4. a.

If the defendant pleads, that he paid *tot denar. summas quant.*, the plaintiff *meruit*, without saying what sum he paid, it is bad. R. Mar. pl. 120.

So, if a man be bound to give all the money in his pocket, if he says that he gave all, it is bad; for he ought to show what sum he gave. Latch, 16.

So, if he be bound to convey all his land, and he pleads, that he has conveyed all. Ibid.

So, if a man be bound to pay all charges to A.'s attorney, expended in such a suit, if he pleads that he paid *omnes misas et custagia* in that [\*]suit, it is bad; for he ought to show that the charge was so much, which he has paid. R. Lut. 421, 422.

If the defendant pleads that A. has paid all debts to the plaintiff, he ought to show what debts, &c. R. 3 Leo. 3. Mo. 12.

If he pleads that he made an estate by the advice of B., it is bad, if he does not show what estate. Hob. 295.

If he pleads that he levied part of the money, without saying how, it is bad. R. 3 Leo. 223.

If he justifies a taking for a contempt *tam verbis quam factis*, without shewing what the words or facts were. R. 2 Leo. 34.

If he pleads payment to an assignee of a bill of exchange, he ought to show a custom to assign. Semb. 3 Mod. 226.; but afterwards it was R. cont. Sho. 128.

If he pleads an excuse of his performance, he ought to show all done by him that he could do. R. Sho. 335.

If he pleads the taking of a ship as a prize, he ought to show a cause of forfeiture. R. Carth. 32.

If a condition be to deliver at such a day, it is not sufficient to say that he delivered *secundum formam conditionis*, without showing what and at what time in certain. Semb. 1 Lev. 145.

If it be to enjoy an office according to letters patent, he ought to show the effect of the patent, and that the plaintiff enjoyed accordingly. Hob. 295.

If the defendant pleads a feoffment to a use, it is not good, if he does not show a seisin at the time of the feoffment. Kit. 228. b.

So, if he pleads a lease and release, and does not show possession at the time of the release. 7 H. 7. 3.

If he pleads an entry by the command of *certain que use*, and does not show that he was seised to the use. Kit. 228. b.

If he pleads a re-entry for nonpayment of rent, and does not allege a certain demand. R. Al. 19. R. Hob. 331.

If he pleads a descent to him as heir, without saying how he is heir. 1 Lev. 190.

If the defendant, in trespass *quare clausum fregit*, pleads that it was his freehold, he must say, at the time of the trespass, otherwise it will be bad. Pol. 132.

So, if he pleads that the rent was more than the value, in debt for rent against him as executor, without saying at what time it was so, it is bad. Pol. 132.

If in trespass; he pleads that three justices did not, &c., he must say *nec eorum aliquis*. 2 Mod. 284.

If he pleads *pro eo quod non monstravit*, &c., it is bad; for the matter in bar must be alleged certainly. R. Cro. El. 242. Semb. 1 Sand. 117. Dy. 254. b.

Or, he pleads *quia obstruxit*: for he ought to say precisely *quod obstruxit* Cro. El. 441.

In a plea to part, the part to which it is pleaded ought to be ascertained. Vide post, (E 27.—F 4.)

In a plea, the certain place and time of every thing material and traversable ought to be alleged. Vide ante, (C 19, 20.)

How it shall be alleged, vide ante, (C 19.)

{ A material and traversable fact must be expressly stated, and cannot be inferred from other parts of the pleadings. Frary v. Dakin, 7 Johns. Rep. 75. Vide Bakewell v. Dalton, 5 Day, 489. Eastman v. Curtis, 1 Conn. Rep. 323. }

[\*](E 6.) And shall be most strong against the defendant.

And shall be taken most strongly against the defendant. Co. Lit. 303. b. Pl. Com. 29. a.

And therefore, in trespass, if the defendant pleads a release, without saying at what time it was made, it shall be intended to be made before the trespass; for this is most strong against the defendant. Pl. Com. 46. a.

So, in waste, if the lessee pleads that it was for mines, without saying when the mines were opened, it shall be intended that they were opened after the lease; for that is the most strong against the defendant. Per. Hob. 234.

If the defendant pleads, that A. seised of a manor *unde locus in quo*, &c. was parcel, demised his manor except B. &c., it shall be intended that the *locus in quo*, &c. was parcel of B., if the contrary does not appear. R. Pl. Com. 104. a.

So, if to a bond the defendant pleads payment, it shall be intended after the day, if he does not say otherwise. Pl. Com. 104. a.

In *dum fuit infra ætat.*, if the tenant pleads a release by the demandant, without saying when, it shall be intended within age. Pl. Com. 104. a.

If a man pleads *quod A. cat. et arrestat. fuit in Lond.*, without saying by what authority, it shall be taken to be an arrest by wrong. Dy. 120. a.

But it shall not be intended against the defendant, where such intentment is not consistent with another part of the plea; as, a lease by a bishop shall not be intended to be by one then alive, where the plea afterwards says *per A. nuper episcopum*. R. 10 Co. 59. b.

(E 7.) But certainty to a common intent is sufficient.

But certainty to a common intent is sufficient. Co. Lit. 303. a. Vide ante, (C 24.) { Vide Spencer v. Southwick, 9 Johns. Rep. 314. Service  
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v. Heermance, 1 Johns. Rep. 91. Peebles v. Kittle, 2 Johns. Rep. 363. Frary v. Dakin, 7 Johns. Rep. 75. Currie v. Henry, 2 Johns. 433. Cruger v. Cropsey, 3 Johns. Rep. 242. Cantillon v. Greaves, 8 Johns. Rep. 369. 2d edit. Morgan v. Dyer, 10 Johns. Rep. 161. Hines v. Ballard, 11 Johns. Rep. 491. Van Ness v. Hamilton, 19 Johns. Rep. 349. Roosevelt v. Kellogg, 20 Johns. Rep. 208. }

And therefore, in assize, if the tenant plead that his father was seised and died seised, and he entered a son and heir, it is good; though it may be that the father of the demandant abated after his ancestor died and before his entry: but it shall not be intended; for when he says, that his father died seised and he entered, the common intendment is, that he entered immediately. Pl. Com. 26. 28. 33.

So, if a plea be, that the defendant surrendered and released a copyhold in full court, and the plaintiff accepted it, though it is not said that the surrender was to the plaintiff's use, it is sufficient; for it shall be intended. R. Cro. Car. 6.

So, a plea to debt on a bond for the enjoyment of land, which *post confessionem usque diem billæ* the plaintiff enjoyed, is good, though it is not said *semper post*; for it shall be intended. R. Cro. Car. 195.

So, in trespass, if the defendant justifies as servant, without saying by his command, it is good; for it shall be intended.

If the defendant says that the master of a college and his fellows were seised in fee, it shall be intended, in right of the college. Pl. Com. 102. Vide post, (2 B 1.)

If several writs are mentioned to sheriffs of several counties, and one was an extent, and it is said *quod prædict. sheriff* returned, &c., it [\*] shall be intended the same sheriff to whom the writ was directed. Pl. Com. 65. b.

In pleading the taking of a term under a *fieri facias*, it is sufficient to state that the party was possessed "of a certain interest in the residue of a certain term of years;" for the sheriff, who has not the title deeds, cannot exactly define what the precise interest is. Taylor v. Cole, B. R. E. 29 Geo. 3. 3 T. R. 292.

(E 8.) So, less certainty where the matter may be ascertained by evidence.

So, where no certainty at present is known, it is sufficient to show the certainty in evidence, and allege generally in the pleading; as, if a man assumes to give a bond with sufficient sureties to save harmless in such a suit; it is sufficient to say that he gave a bond with sufficient sureties, without saying in what penalty, &c.; for, till the suit is determined, it is not known how much is sufficient, and it shall be shown in evidence. R. 1 Lev. 297.

But, a corrupt agreement for the forbearance of money, till one or the other of two days, must be pleaded according to the fact in the alternative; and if it be stated as an absolute forbearance till one of those days, the evidence will not support the plea. 3 T. R. 531.

(E 9.) And necessary circumstances shall be intended.

And necessary circumstances shall be intended; as, if a man pleads a feoffment, livery need not be alleged; for it shall be intended. Co. Litt. 303. b.

So, attornment of tenants shall be intended, if a feoffment of a manor be pleaded. Co. Lit. 310. b.



So, if the defendant pleads an assignment of dower, it shall be intended to be by metes and bounds. D. Cro. Car. 162.

If he pleads a request by an inferior judge to a superior to assume the jurisdiction of a cause out of the inferior ecclesiastical court; it shall be intended that the request was under seal. R. Cro. Car. 162.

So, if he pleads that the sheriff made a warrant, he need not say *sub sigillo*. R. Cro. El. 53. Pal. 357.

If he pleads himself to be heir to A., he need not say that A. is dead. Dal. 67.

Or, that A. had no son, &c. Dal. 67.

So, where the plea refers to a thing which shows the certainty, it need not be particularly alleged; as, in debt on a bond, if the defendant pleads a recovery and execution against another obligor, he need not say by what process or in what county; for this appears by the record. R. Dal. 33.

So, where the certainty of the lands appears, there is no need to say *per nomen* how they are described by the deed; which will not make a bad plea good, though sometimes it makes a plea bad. Lut. 1006.

### (E 10.) And less certainty is necessary for an inducement.

And it is not requisite to have so much certainty in pleading a matter which is only conveyance or inducement. Co. Litt. 303. a. Vide ante, (C 31. 43.) Post, (E 18.) { Tousey v. Preston, 1 Conn. Rep. 175. }

As, in trespass, if the defendant justifies, that he being possessed for [\*] years the plaintiff would have ousted him, and he in defence of his possession *moliter manus imposuit*, he need not shew by whom, or when, or for how many years he was possessed. R. Cro. Car. 138. Vide post, (E 19.)

In annuity, if the defendant pleads that it was granted for holding his courts, and being seised of the manor of D., he requested the plaintiff to hold a court there, who refused; he need not say of what estate he was seised, Cro. El. 419.

In trespass, if the defendant justifies by a devise, and the plaintiff replies that the deviser died seised, and it descended to him as cousin and heir, he need not show, how cousin. R. 2 Cro. 86.

In an action upon the case for a nuisance in throwing carrion into a close *per quod diversa averia interierunt*, it is sufficient, without saying what or how many beasts. R. Al. 22.

If a man makes title to an office, he ought to prescribe for it; but if he alleges the office only as inducement, it is sufficient to say *quod est antiquum officium*. R. 10 Co. 59. b.

In avowry, if he alleges a partition between A. and B., whereby the *locus in quo*, &c. *inter alia fuit allot.* to A., and so justifies, damage feasant, it is sufficient, without saying what lands in certain were allotted to A. and what to B. R. Plo. 431. A.

### (E 11.) Or, for a negative matter.

So, there is no need of so much certainty for a matter in the negative. D. Pl. Com. 33. b.

As, in an action upon the case for not taking sufficient pledges, the general averment, that he has not taken sufficient pledges, is sufficient, being in the negative. R. Lut. 159.

In debt on a bond to indemnify, it is sufficient to say, not damnified, without showing how he has indemnified. Vide post, (E 25.)

In debt on a bond that he will permit ingress and regress, &c. it is sufficient to say, *quod permisit*; for that is tantamount to that he did not disturb. R. 1 Leo. 136.

(E 12.) And surplusage does not prejudice.

And surplusage does not prejudice; as, if the defendant in replevin avows as bailiff to A., administrator of B., where A. ought to distrain in his own right, the words administrator of B. shall be rejected as surplusage. D. Hob. 208. Vide ante, (C 28.)

Except where it is repugnant or contrary to matter precedent. Co. Lit. 303. b.

As, if in *quare impedit* the defendant pleads a presentment of one *mere laicus* who was admitted, instituted, and inducted, *per quod ecclesia remansit vacua*; this is repugnant. Dy. 293. a.

In action of assault against A. and B., if A. confesses, and B. pleads that he and A. are not guilty, and issue is joined, and B. found guilty, the words relating to A. may be rejected. Hill v. Fleming, M. 10 G. 2. B. R. H. 341.

(E 13.) When the general issue shall be pleaded.

When a man has no special matter for his justification or excuse, he ought to plead the general issue, to avoid prolixity in records.

[\*]And in some cases, by certain acts of parliament, the general issue may be pleaded, and the special matter given in evidence.

As, in trespass for a tortious distress for rent, by 11 Geo. 2. c. 19. s. 21. Vide Doug. 283.

So, by st. 7 Jac. 1. c. 5. made perpetual by 21 Jac. 1. c. 12., a justice of peace, constable, &c. being sued for what he had done by virtue or reason of his office, may plead the general issue, and give the special matter in evidence. Vide Doug. 307.

And he may plead the general issue, though the declaration contains matter of record, as well as of fact. Vide post, (2 II.)

And if a man may plead the general issue, it is more safe; for if he pleads generally, he gives the advantage of a replication or defence to the other party. D. Hob. 103.

And therefore after a special plea, he may waive it, and plead the general issue.

But he cannot waive it after a motion and order for a trial at bar. F. g. 267.

{ But if a defendant before a justice, in an action of trespass, rely on his plea of title, he admits the trespass, and cannot afterwards, when the cause is removed into the supreme court, plead the general issue. Strong v. Smith, 2 Caines' Rep. 28. }

The general issue needs no inducement; as, not guilty, *nil debit, ne disturba pas*, &c. Hob. 103.

If the general issue be pleaded, the plaintiff cannot reply, but must join issue. Semb. Co. Lit. 126. a.

As, if the defendant pleads not guilty, *nil debit*, &c. *et de hoc ponit se super patriam*, the plaintiff regularly shall join with him in the like form, *et prædict. plaintiff similiter*. Ibid.

So, sometimes on a negative plea, the plaintiff or defendant shall join as on a general issue, and cannot reply; as, in dower, if the tenant pleads *ne unques seisie que dower*. Ibid.

So, if the defendant or tenant pleads a fine in bar, and the plaintiff or de-  
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mandant replies *quod partes finis nihil habuerunt, et hoc petit quod inquirata per patriam*, the tenant or defendant shall say *et prædict.* A. *similiter.* Ibid.

So, if the tenant vouches, and the demandant counterpleads the voucher, for that the vouchee or his ancestors had nothing by which they could enfeoff *et hoc petit, &c.*, the tenant shall say, *et prædict.* T. *similiter.* Ibid.

On *non assumpsit*, an usurious contract may be given in evidence, but in case of a specialty, it must be pleaded. Lord Bernard v. Saul, H. & G. Str. 498.

On, not guilty, for beating a horse, defendant may justify in evidence. Slater v. Sevan, T. 4 G. 2. Str. 872.

In case, on general issue pleaded, any thing may be given in evidence that destroys plaintiff's action. Barber v. Dixon, H. 17 G. 2. Wils. 44. < Vide Beadle v. Hopkins, 3 Caines' Rep. 150. Linsley v. Keys, 5 Johns. Rep. 123. Collier v. Moulton, 7 Johns. Rep. 109. >

If defendant withdraws a special plea, he cannot plead another, but the general issue only. Law v. Law, H. 7 G. 2. Str. 960. 1 T. R. 693.

Though defendant may strike out special plea, and plead the general issue, yet he cannot do so without leave of the court; nor can he do it after a sham plea. Weld v. Needham, M. 17 G. 2. 1 Wils. 29. Elis v. —, II. 8 G. 3. 2 Wils. 369.

He may do it the same term, before replication, without costs; and if plaintiff has a verdict afterwards, he cannot have those costs. Barnes, 127.

Plea of judgment, &c. may be withdrawn, and *plene administravit* pleaded. Ibid. 330.

Plea of tender cannot be withdrawn to plead general issue. Ibid.

[\*] After *non assumpsit infra*, &c., defendant may not add *non assumpsit*. Barnes, 332. 338.

After demurrer by bail, joined, *nul tiel* record shall not be pleaded. Ibid. 334.

Demurrer may be withdrawn, and general issue pleaded, if defendant offers it before assizes. Ibid. 337.

General issue may be withdrawn, and special justification pleaded, on costs, if plaintiff not delayed thereby. Ibid. 346.

Leave has been given to withdraw a plea of *non est factum*, and plead infancy. 1 Bl. 357.

If a special plea goes to the action, and plaintiff replies to the country, and has been delayed, the court will not give leave to withdraw, and plead the general issue. Freeman v. Jones, H. 9 G. 3. 2 Wils. 391.

If a mistake happens by death of attorney, general issue may be withdrawn, and money paid into court. Barnes, 344.

Payment of money into court is an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the sum so paid. Cox v. Parry, B. R. M. 27 G. 3. 1 T. R. 464. Watkins v. Towers, B. R. H. 28 Geo. 3. 2 T. R. 275.

Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the hand-writing of the drawer. Gutteridge v. Smith, C. P. M. 35 Geo. 3. 2 H. Bl. 274. a. Vide supra, (C 10.)

< To a declaration containing a count on a warranty on a sale, and a count in *assumpsit*, both arising out of the same transaction, the defendant may plead not guilty. Hallock v. Powell, 2 Caines' Rep. 216.

The plea of *non est factum* merely puts the deed in issue; and the plaintiff need not prove the other averments in his declaration. Gardner v. Gardner, 10 Johns. Rep. 47. >

(E 14.) Plea amounting to the general issue, is bad ; wherein what may be pleaded specially.

And therefore a plea, which amounts to the general issue, is bad ; for the general issue ought to be pleaded. Co. Lit. 300. b. 3 Mod. 166.

{ Vide Kennedy v. Strong, 10 Johns. Rep. 289. Bank of Auburn v. Weed, 19 Johns. Rep. 300. Freeport v. Edgcumbe, 1 Mass. Rep. 459. Moors v. Parker, 3 Mass. Rep. 312. Per PARSONS, Ch. J. Martin v. Woods, 6 Mass. Rep. 6. Van Ness v. Forrest, 8 Cranch, 30. }

As, in trespass by a commoner, if the defendant pleads, that, being lord, he dug in the common for coals, and left sufficient common ; for this amounts only to—not guilty. R. 1 Sid. 106.

So, in *assumpsit*, if the defendant pleads a bond given for the debt and execution thereon, and traverses that he was indebted *aliter aut alio modo*. R. Cro. El. 201. Semb. 5 Mod. 314. Vide post, (2 G 12.)

Or, pleads another promise, and traverses the assumption *modo et forma*. R. 2 Rol. 350.

So, in assize, if the tenant pleads a feoffment by the demandant ; for this amounts to the general issue.

So, in trespass for goods taken ; property in A., who gave them to the defendant, amounts to the general issue. 5 Mod. 253.

Or, property in A., and impounding by the plaintiff, upon which the defendant by replevin took them. Semb. 5 Mod. 252. R. 1 Sal. 394.

So, in trespass *quare clausum fregit*, if the defendant justifies by a demise to him by the plaintiff at will, for years, &c. Sti. 355. 5 Mod. 353.

Or, if he justifies damage feasant in another close. Lut. 1451. Per two J. Dy. 19. a.

So, in trespass *quare clausum fregit*, and broke his hop-poles, if defendant pleads *liberum tenementum*, and that the poles were damage feasant, and he distrained them, it is bad. R. on demurrer. Sparks v. Keble, M. 11 G. Fort. 378.

Or, if plaintiff declares for obstructing his watercourse, by digging pits [\*] and making ponds ; and defendant pleads, that there were two antient pits, which were choaked up with mud, and therefore he made two others, which he had a right to do, &c., it amounts to the general issue ; for he had no right to make new pits, though he might have scoured the old. Brown v. Best, M. 21 G. 2. 1 Wils. 174.

So, in *audita querela* on a defeazance, if the plaintiff pleads another defeazance, and traverses the defeazance in the declaration, for it amounts to *non est factum*. R. Cro. El. 532.

In debt on a bond, if the defendant pleads that it was his deed, but not delivered to the plaintiff but to another. R. 1 Sid. 450.

If, on a bond to A. the plaintiff's wife, the defendant pleads that it was delivered to A., *quæ obiit inupta* ; for, then *non est factum*. R. 1 Vent. 77.

If, to an action on the case for a vexatious petition against him in council, he pleads that the plaintiff did such an act, for which, &c. R. 3 Mod. 166.

So, in trover, if the defendant pleads that he took, as a distress for toll, &c. R. Hob. 187. R. Cro. El. 435.

So, in trespass by A. for goods, if the defendant justifies by process out of the hundred, court upon a replevin against the goods of B., for if they are the goods of a stranger, the defendant is not guilty. R. Skin. 674.

Yet, matter of law may be pleaded specially, though it may be given in evidence on the general issue. R. 2 Vent. 205. R. inter Hussey and Ja-  
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cob in B. R. T. 8 W. 3. 1 Sal. 344. 2 Mod. 276. Per Holt, Skin. 362.

So, if an administrator pleads, that goods of the intestate to such a value came to his hands, which he detains for his own debt, and has no assets *ultra*, it is good, though it amounts to *plene administravit*. R. Hob. 127.

In conspiracy, the defendant may plead a legal prosecution, though it amounts to — not guilty. R. Cro. El. 871.

In *assumpsit*, payment, though it may be given in evidence on *non assumpsit*. R. 1 Sal. 394. [or accord and satisfaction, R. Ld. R. 566.]

In debt, a release, though it may be given in evidence on *nil debet*. 1 Sal. 394.

In debt, upon a lease for years, entry into part. 1 Vent. 2.

So, if the plea be for greater certainty ; as, in trespass in A., if the defendant pleads that there are several A.'s and none without addition, and justifies in black A. ; this does not amount to the general issue. Semb. Lut. 1492.

So, an entire plea is good, though to part of the declaration it amounts only to the general issue. R. 3 Lev. 40.

So, a plea, which confesses and avoids the plaintiff's title, is good, though the matter may be given in evidence, on the general issue : as, in trover, if the defendant pleads that A. was possessed and lost the goods, that B. found them, and gave them to the plaintiff, who lost them, and the defendant found them, and by the command of A. converted them. R. Cro. El. 262. R. cont. Latch, 185., for there it is said, that every plea in trover which gives colour to the plaintiff, is bad, because it amounts to the general issue, except where it concerns [\*]the title of land. Vide Cro. El. 555. 146. 1 Leo. 178. Vide Action upon the Case upon Trover, (G 6.)

Matter which might be given in evidence on the general issue, if it admits the plaintiff had once a cause of action, may be pleaded specially. R. Ld. R. 566.

Matter of fact, if intermixed with matter of law, may be pleaded specially, though it might be given in evidence on the general issue. R. Hussey v. Jacob, Ld. R. 87.

Thus, in an action of *assumpsit*, the defendant may plead the statute of gaming, though he might have insisted upon it under the general issue. Ld. R. 87. p. c.

So, in debt upon a bond, the defendant may plead, that at the time of making it she was a feme covert, though she might have taken advantage of her coverture upon the plea of *non est factum*. D. Ld. R. 89.

So, coverture may be pleaded in bar in an action of *assumpsit*, though it might be given in evidence on the general issue. R. James v. Fowkes. Ld. R. 89. in Marg.

A defendant cannot properly plead specially what merely negatives the charge in the declaration. R. Green v. Pope, Ld. R. 125.

Thus, in an action for a false return to a *mandamus*, the defendant cannot reassert the truth of the facts contained in the return. Ld. R. 125. p. c.

So, it is bad, though it concerns the title, if it does not convey a good title, Latch, 185.

And therefore it seems to be in the discretion, of the court, when a plea amounting to the general issue, shall be allowed ; and therefore the plaintiff ought not to demur, but pray the opinion of the court. D. Hob. 127. R. 1 Leo. 178.

And a plea amounting to the general issue is only form. Semb. 1 Rol. 113. Cont. 2 Rol. 350. Semb. Cro. El. 871. R. Sho. 76. 133.

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(E 15.) When a plea shall be special:—If it be by way of excuse or justification.

But, if a man has matter of justification or excuse, he ought to plead it specially. Co. L. 282. b. { Vide Hoyt v. Gelston, 3 Wheat. 246. }

Justification is a conclusion of law, which necessarily results from a given state of facts. 1 T. R. 507, 784.

As, if he justifies by process out of an inferior court, he ought to show in what action, &c. that it may appear that the inferior court had jurisdiction. Per two J. Mar. 118.

In debt upon a lease of a vicarage, if the defendant pleads a sequestration, he ought to show before whom, for what cause, and legal process. Hob. 296. Vide post, (E 18.)

If the defendant pleads a discharge, he ought to show specially how he was discharged. Hob. 296.

As, if he pleads a discharge of tithes, which is a bar to a thing due of common right, he ought to show how. Ibid.

A plea in justification must confess the trespass, tort, &c. Sal. 637, 8.

That is, a plea must admit the facts which it professes to justify. 3 T. R. 298.

Trespass for taking materials; on—not guilty pleaded, defendant shall not give evidence of taking the goods as a deodand, for he should have justified. Dryer v. Mills, T. 3 G. Str. 61.

[\*] On trespass by husband and wife, defendant on the general issue shall not controvert the marriage. Deckinson v. Davis, M. 8 G. Str. 480.

If defendant claims an easement, he must plead it specially, and cannot give it in evidence on the general issue. Hawkins v. Wallis, T. 3 G. 3. 2 Wils. 173.

To trespass *quare clausum*, &c. a highway must be pleaded specially. Barnes, 448.

How performance or other acts are to be averred. Vide ante, (C 51., &c.)

{ *Payment.* If the defendant, after an imparlance, pay the plaintiff's demand, he may plead a regular plea of payment. Tillotson v. Preston, 3 Johns. Rep. 229.

If to an action on bond conditioned for the payment of 77*l.*, the defendant plead that he paid a less sum which the plaintiff accepted in full satisfaction of the sum mentioned in the condition of the bond and in full of all demands, such plea is bad, either as a plea of payment, or of accord and satisfaction. Dederick v. Leman, 9 Johns. Rep. 333. Vide Mechanics' Bank v. Hazzard, 13 Johns. Rep. 353.

Where a declaration on promissory notes, alleged, that the defendant had not paid the sums of money mentioned, &c. and the defendant pleaded, *puis darrein continuance*, that he paid to the plaintiff the several sums of money mentioned in the plaintiff's declaration; this, on demurrer, was held to be good; being as broad as the declaration. Chew v. Woolsey, 7 Johns. Rep. 399.

In a plea of payment, it is unnecessary to allege the payment of interest, particularly. Tillotson v. Preston, 3 Johns. Rep. 229. Vide Chew v. Woolsey, *ut supra*.

A plea in bar to an action of assumpsit, averring, that the defendant tendered a certain sum in full of the plaintiff's demand, the plaintiff replying new matter without traversing the sufficiency of the tender, is good on demurrer, though from the face of the record, computing interest at six per cent. the amount of the debt exceeds the sum tendered. Vermont Bank v. Porter, 5 Day, 316.

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**Release.** A release by the obligee, on a joint, or a joint and several bond, to one obligor, is a release to all, and may be by them pleaded in bar. *Rowley v. Stoddard*, 7 Johns. Rep. 207. *Austin v. Hall*, 13 Johns. Rep. 286.

But it must be a technical release under seal; a covenant not to sue, or a receipt, are not sufficient. *Rowley v. Stoddard*, *ut supra*. *Harrison v. Close*, 2 Johns. Rep. 448.

In pleading a discharge by an instrument, which has effect by its own validity, without regard to the consideration upon which it was made, the manner in which it was made, must be specially stated, as the sufficiency and effect of it, is matter of law, to be determined by the court. *Bender v. Sampson*, 11 Mass. Rep. 42.

**Former Recovery.** What shall be intended by the "same cause of action." *Rice v. King*, 7 Johns. Rep. 20. *Johnson v. Smith*, 8 Johns. Rep. 299. 2d edit.

A former recovery and satisfaction, in an action between the same parties, and for the same cause, is a good bar. *Rice v. King*, and *Johnson v. Smith*, *ut supra*. *Thomas v. Rumsey*, 6 Johns. Rep. 26.

So, in an action against two, on a joint promise, a former judgment against one of them, for the same cause, is a good bar. *Ward v. Johnson*, 13 Mass. Rep. 148.

A recovery in a former action apparently for the same cause, is only *prima facie* evidence, but is not conclusive. *Snider v. Croy*, 2 Johns. Rep. 227.

Where several matters have been once submitted to the jury, their verdict will be a bar to another action, though they separated the plaintiff's demand, in passing upon it, and gave no verdict upon a part. *Brockway v. Kinney*, 2 Johns. Rep. 210. Vide *Platner v. Best*, 11 Johns. Rep. 530.

But it seems, that if a person sue upon several and distinct causes, and a part of them only is submitted to the jury, he is not precluded from again suing for such distinct cause as was not passed upon. *Wheeler v. Van Houten*, 12 Johns. Rep. 311. Vide *Snider v. Croy*, 2 Johns. Rep. 227.

So, a process, judgment and satisfaction under the laws of another state, authorizing the process of foreign attachment, is a good bar to another action. *Embree v. Collins & Hannay*, 5 Johns. Rep. 101. *Prescott v. Hull*, 17 Johns. Rep. 284.

But it seems, that the pendency of a suit in another state, or foreign court, between the same parties, and for the same cause, is not a stay or bar to a second suit. *Bowne v. Joy*, 9 Johns. Rep. 221.

A judgment recovered since the commencement of the action, may be pleaded, by executors, in bar of the action; though, generally, a matter of defence arising after suit brought, cannot be pleaded in bar, yet it may be pleaded in bar of the further maintenance of the suit. *Covell v. Weston*, 20 Johns. Rep. 414.

A nominal plaintiff, suing for the benefit of his assignee, cannot by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against a subsequent suit for the same cause of action. *Welch v. Mandevill*, 1 Wheat. 233.

**Award.** Where there is a submission to arbitration, of all demands between the parties, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award; although the de-

mand for which the action is brought, was not laid before the arbitrators, or considered by them. *Wheeler v. Van Houten*, 12 Johns. Rep. 311.

But in pleading an award, in bar, it is, in general, unnecessary to aver performance. *Armstrong v. Masten*, 11 Johns. Rep. 189.

Any matter of defence which denies what the plaintiff is bound to prove, on the general issue, or be nonsuited, ought not to be pleaded specially. *Bank of Auburn v. Weed*, 19 Johns. Rep. 300.

In a plea of justification of a libel, it is no excuse for general pleading, that the subject comprehends a multiplicity of facts; nor is it sufficient, that the plea is as general as the charge in the declaration; it must state the particular facts which constitute the charge, with certainty, so that the plaintiff may take issue upon them. *Van Ness v. Hamilton*, 19 Johns. Rep. 349.

If, in an action of trespass, the defendant justify under an execution, the general allegation that the execution was regularly issued on a lawful judgment, is sufficient. *Hamilton v. Lyman*, 9 Mass. Rep. 14.

In an action of covenant on a policy, under seal, all special matter of defence must be pleaded. *Marine Ins. Co. v. Hodgson*, 6 Crauch, 206. }

### (E 16.) In answer to special matter.

So, special matter ought to be specially answered. Co. Lit. 303. b.

In maintenance, the defendant justifies, that he being a neighbour, recommended a counsel to him; the plaintiff replies, that he gave him money; the defendant cannot rejoin, that he did not maintain *modo et forma*, but must answer the special matter. Kit. 232. a.

### (E 17.) Act by special authority.

So, if a man be enabled by a warrant, or other authority, regularly, he ought to shew it specially. Co. Lit. 283. a.

As, in trespass, if the defendant justifies as bailiff to the sheriff, it is not sufficient to say that he did it by the mandate of the sheriff, but he ought to show his warrant. R. 3 Mod. 138. 4 Mod. 378.

So, in trespass, it is not sufficient to say that the defendant took, &c. *tanquam ballivus manerii per mandat. domini*; but he ought to show a precept directed to him. R. 4 Mod. 378.

And he ought to show the substance and effect of his authority to have been specially pursued. Co. Lit. 303. b.

In a justification under mesne process, the defendant must plead that the writ was returned; but in a justification under a writ of execution, the return need not be stated. 5 Co. 90. Cowp. 18.

A defendant in an action for false imprisonment, pleading a justification under mesne process sued out by him in a cause in which he was plaintiff, may state that the writ issued on an affidavit to hold to bail, without setting forth the cause of action. 3 T. R. 183.

And if the writ be pleaded as sued out on a day between the essoign-day and the first day of the term, and there be a special demurrer for that cause, the objection will not prevail, though the court do not in fact sit till the *quarto die post*. Ibid.

### (E 18.) When a record, &c. shall be specially alleged.

When matter of record is the foundation and substance of the plea, it ought to be certainly and truly alleged. Co. Lit. 303. a.

And a record must not be alleged *inter alia*, for it is entire, and depends

upon an original and a judgment, and cannot be divided. D. Hob. 226. Pl. Com. 65. a.

And therefore, in an inferior court, which is not of record, the whole proceeding there ought to be pleaded at large; and it is not sufficient to say, *taliter processum fuit*. R. 2 Vent. 100. Vide infra.

So, the proceedings in an inferior court, though it be of record. Semb. 2 Vent. 100.

So, a plaint alleged, upon which *taliter processum fuit* that there was judgment, without shewing an appearance and declaration, is not sufficient. R. Lut. 918.

[\*]So, in pleading an execution by a court at Westminster, he ought to allege an ejectment, &c., upon which *taliter processum fuit*, that the plaintiff had judgment, and thereupon sued out execution; and it is not sufficient to allege an execution without showing the judgment. R. 1 Lev. 83.

Yet, if proceedings in an inferior court be pleaded, it is sufficient to say that a plaint was levied, and thereupon *taliter processum fuit*, that the plaintiff was nonsuited, &c. R. 2 Lev. 81. Semb. Sho. 48. Semb. 3 Lev. 242. R. 3 Lev. 404. Ca. Parl. 94. Carth. 53. Cowp. 18.

So, if he pleads, that *implacitasset* and found pledges, upon which *taliter processum fuit*, &c. without saying that a plaint was levied, for it is tantamount. R. 3 Lev. 404.

So, if he pleads that a plaint was levied, upon which process issued to the defendant, who took, and afterwards permitted an escape; it is sufficient, without showing what authority the court had, where the plaintiff is a stranger to it. Adm. Cro. Car. 46. Dub. Mod. Ca. 72.

And such short pleading is sufficient in an inferior court, though it be not of record; for the whole shall be given in evidence. Ca. Parl. 94.

In an action founded on the judgment of a court of record of limited jurisdiction, sufficient must be set forth to shew that they had jurisdiction to give the judgment; and if sufficient be stated for that purpose, it will be intended that they acted right, unless the contrary appear upon the record. Sollers v. Lawrence, C. P. T. 16 & 17 Geo. 2. Willes, 413.

But, if matter of record is only conveyance, it is sufficient if it be summarily alleged. Co. Lit. 303. a.

As, in *assumpsit*, to indemnify his bail, if it shows that he was bail in an action in the court of Oxford, in which *taliter processum fuit*, that the defendant there was condemned; it is sufficient, without setting out the whole record; for it is but inducement. Per two J. Fenner cont. Yel. 16.

So, in an action for an escape on a *capias utlagat.*, it is sufficient to begin, *quod cum recuperasset*, &c. without setting out the whole record, for it is only conveyance to the action. R. Cro. El. 877. Lut. 111.

So, in *assumpsit* to indemnify, it is sufficient to show, *quod implacitasset et recuperasset*, without alleging how. R. 2 Cro. 10. 46.

So, in an action for a deceit, conspiracy, &c. founded on a record; it is sufficient to begin, *quod cum recuperasset*. 2 Cro. 567.

So, in debt upon a judgment in an inferior court, not of record; it is sufficient to say, *quod cum recuperasset*, without shewing the plaint or process. R. after verdict. Sho. 71.

So, in an action, where the record is not inducement, but the very foundation; as, in debt on a judgment; it is sufficient to begin, *quod recuperasset*. R. 2 Cro. 567.

So, proceedings and sentences in the ecclesiastical court may be summarily alleged; as, that there was a divorce between such parties, for such a

cause, before such a judge, *concurrentibus iis quæ in jure requiruntur*. Co. Lit. 303. a. D. Hob. 296. Cro. Car. 162. R. 2 Cro. 351.

That A. sued in the spiritual court for a portion of goods, *et taliter processum fuit*, that the judge decreed, &c. Lut. 304.

[\*] But it is not sufficient to allege generally, *concurrentibus iis qui in jure requiruntur*. D. Hob. 296.

Nor, is it sufficient to allege *taliter processum* in the same court, without saying in what place the court was held ; for though the same court shall be intended the same as to jurisdiction, it shall not be intended to be held in the same place. Lut. 305.

So, if the defendant justifies the taking of ship as a prize, and that it was condemned in the admiralty ; it is not sufficient, without saying how it was a prize, and before what judge, and where it was condemned. R. Sho. 6 Carth. 32.

So, if in justification in trespass for carrying away plaintiff's goods, defendant pleads process of an inferior court, directed to the bailiffs of the borough, being officers of the court, and that he, being a bailiff and officer of the court, by virtue thereof, took, &c., it is bad. Watkins v. West, T: 2 G. 2. Ld. Raym. 1530.

### (E 19.) When estates shall be specially alleged.

So, the commencement of particular estates ought to be specially shown. Co. Lit. 303. b. Vide infra.

As, if the defendant pleads an estate for life.

So, if he pleads that A. was seised for life, remainder to B. in tail, remainder to B. in fee ; and that A. and B. demised to him ; it is not good, without showing the commencement of the estate for life. Dub. 1 Leo. 177. Cro. El. 153, 4.

That husband and wife seised to them and the heirs of the husband ; demised, &c. Semb. Cro. El. 112.

So, the commencement of an estate-tail, generally, ought to be shown. Co. L. 303. b.

In a bar, though it need not in a count. Semb. Cro. Car. 571. Jon. 453.

So, if he pleads a confirmation by patron and ordinary, though he need not show what estate the patron has, yet, if he pleads that he has for life, he ought to show how it commenced. R. Cro. El. 13.

So, if a man pleads a term for years, he ought to show the commencement of the term.

As, in an action for land, or trespass upon the land, in which the title to the land may come in question, if the defendant justifies under a term for years ; it is not sufficient to say *quod possessionatus fuit* of the term, without showing the commencement of the term. Agr. 2 Mod. 70. R. Carth. 444.

Wherever a particular estate is pleaded, its original must be shown. 3 Wils. 65.

As, if defendant in trespass *quare clausum*, &c. justifies under a lease from a tenant for ninety-nine years, he must show the commencement of that estate for ninety-nine years, though the original lease is in the hands of plaintiff. Johns v. Whitley, P. 10 Geo. 3. 3 Wils. 65.

So, in trespass for the taking of a horse, &c. ; if the defendant justifies under a term, he ought to show the commencement of his estate. R. cont. ; for here it is alleged only as inducement to his plea. Cro. Car. 138. 2 Mod. 70. 3 Mod. 132. R. acc. Lut. 1492. D. Lut. 1165. For the title may come in question. Per. Pol. 3 Mod. 132. Vide ante, (C 41. 43.)

[\*]So, if a man pleads a tenancy at will, he ought to show how he has it, viz. by demise, as a copyholder, or as tenant, at sufferance. Bro. Plead. 85.

So, the commencement of a copyhold estate ought to be shown. R. 2 Cro. 103. R. Cro. Car. 190. Vide Copyhold, (P 4.)

Though it be in a justification to a trespass, as damage feasant. R. 4 Mod. 346.

Though it be a copyhold in fee. R. 2 Cro. 103. Cro. Car. 90. R. 4 Mod. 346.

But it is sufficient to show the copy of the last admission. R. 2 Cro. 103.

And the omission is only form, and aided on a general demurrer. Cont. 2 Cro. 103. R. Cro. Car. 190.

But it need not be shown where it is alleged as inducement; as, in trespass in his close, if the defendant pleads that he was possessed for years of the adjoining close, and the plaintiff ought to repair the fences, and through the want of repair his cattle escaped; it is good, without showing the commencement of the estate; for the interest of the land cannot come in question. Yel. 74. Co. Lit. 303. Vide ante, (C 43.—E 10.)

So, if the plaintiff shows that husband and wife, seised to them and the heirs of the husband, demised to him, and the defendant obstructed his water-course; he need not show the commencement of the estate of the wife; for it is only inducement. R. Cro. El. 112.

So, if a man shows a grant by copy of a reversion after the death of A., and that A. is dead; he need not show the grant to A.; for it is only conveyance. R. 2 Cro. 52.

### (E 20.) When not.

But the commencement of estates in fee need not be shown. Co. L. 303. b. Cro. Car. 571.

So, a man may plead seisin or reversion in fee after an estate for life without showing the commencement of the estate. 1 Sand. 250. 260.

So, the king, seised in *jure coronæ*, need not show how the estate came to him, if he shows that his ancestor was seised in fee; for it shall be intended to have continuance. R. Bridg. 8.

So, the commencement of an estate-tail need not be shown in a count: and therefore in debt for rent, if the plaintiff counts that his father was seised in tail and made a lease, and that the reversion descended to him as heir of his body, without showing the commencement of the entail, it is good. R. Cro. Car. 571. But antiently it was shown. 4 Mod. 419. And R. that a verdict ought to show it. Cro. El. 407.

So, in an inquisition on the st. West. 2. 46. against those who throw down inclosures, it need not be shown when the estate, which A. (who inclosed) had, commenced. R. Carth. 115.

### (E 21.) It shall show by what title.

If a man pleads or alleges any estate, he ought to show by what title he has it; and it is not sufficient in a bar to allege only a possession. 2 Cro. 52. Yel. 74. 1 Rol. 13. Vide ante, (C 34. 39, &c.)

[\*]Except where it is alleged as inducement; as, in trespass for an assault, if the defendant says that he was possessed of a house for years, and the plaintiff disturbed him, for which reason *molliter manus imposuit*, &c.; it is

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sufficient, without showing by what title he was possessed. R. Cro. Car. 138. 4 Mod. 420. Vide ante, (E 10.)

In an action upon the case by the lessee of a tenant for life, it is not necessary to show the commencement of the estate for life. R. Cro. El. 112. R. Ibid. 113.

(E 22.) In what right seised.

So, if he alleges that he was seised, he ought to allege of what estate he was seised. Cont. 1 Jac. 2. But afterwards 8 W. 3. R. acc. Lut. 1316. Semb. 5 Mod. 72. 150. R. Lut. 1232. Carth. 9. Vide ante, (C. 35.)

So, if persons, who constitute a body politic, are named by their proper names; it is not sufficient to say that they are seised, without saying in right of the corporation. Pl. Com. 103. a.

So, persons seised to the use of an hospital, ought to plead seisin *in jure hospital*.

So, persons incorporated to the use of an hospital, ought to plead seisin *jure in corpor. suæ*; for *jure hospital*. is not good. R. 10 Co. 34. a.

So, a sole corporation ought always to plead seisin in his corporate right. R. 2 Lev. 68. Pl. Com. 103. a.

And the omission will be bad on a general demurrer. Per Powell, Lut. 1232.

But an abbot or prior, &c. and convent, need not say in what right they are seised; for, being persons dead in law, they cannot be seised but in right of their house. Pl. Com. 102. b. Dub. Sho. 63.

So, a corporation named by their corporate name, need not say *quo jure* they are seised; for it cannot be otherwise intended; as, if a mayor and commonalty plead seisin; it is sufficient, without saying *jure corporat*. 1 Leo. 153.

If A., master of a college, and his fellows, plead seisin; it is sufficient, without saying *jure collegii*. R. Pl. Com. 102. b. R. Cro. El. 232.

So, if by the whole plea the manner of the seisin appears, it is sufficient: and therefore, if it be alleged that a woman had a term for years, and took husband, by reason whereof the husband and wife were possessed, it is sufficient, without saying *in jure uxoris*. R. Pl. Com. 191. a.

(E 23.) And shall not plead by *que* estate.

A man cannot prescribe to a thing which lies in grant, and does not pass without a deed or fine, otherwise than in himself and his ancestors, and not by *que* estate; for he ought to show the deed. Co. Lit. 121. a. Vide post, (O 1, &c.)

As, in prescription for a hundred. Bro. *Que Estate*, 9.

So, he cannot prescribe by *que* estate to a rent. Bro. *Que Estate*, 16. 23, 24.

Nor, to a common, estovers, acquittal, &c. Ibid. 16.

Nor, to land.

[\*] Otherwise, if the rent, common, &c. are appendant to a manor, &c.; for he may prescribe by *que* estate to a manor, and what is incident or appendant goes with it. Bro. *Que Estate*, 30. Agreed, 1 Mod. 232. 1 Vent. 139.

So, a plaintiff generally shall not plead by a *que* estate, except where he is in the nature of a defendant, as in a bar to an avowry, vouchee, &c. Hard. 458.

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Nor, in a bar to an avowry, where the assignments are traversable. R. Skin. 304.

So, a corporation cannot prescribe by a *que* estate, but only in themselves and their predecessors. D. 2 Cro. 673.

Nor, a lessee for years, that he and all those whose estate, &c. Lut. 81.

For he ought to allege the prescription in him who has the fee. R. 1 Sal. 363.

So, a man cannot plead or make title by *que* estate to a thing which does not pass without deed. Co. Lit. 121. a.

So, in *quare impedit*, the plaintiff cannot make title to himself by *que* estate to land, to which the advowson is appendant. Bro. Que Estate, 1.

So, in trespass as well as in real actions, the plaintiff cannot make title to land by *que* estate, without saying how, viz. by feoffment or otherwise. Ibid. 18. 27.

So, in an information for intrusion in the exchequer, (in which, by the course of the exchequer, the intruder must make title against the king, otherwise he shall be dispossessed,) the defendant cannot make title to a term by a *que* estate. Dy. 238. b.

(E 24.) When he may plead by *que* estate.

But a defendant may plead by a *que* estate, when the plaintiff cannot. Bro. Que Estate, 1. 27. 40.

So, a plaintiff in replevin in bar to an avowry; for he is in the nature of a defendant. Co. Lit. 121. a. Bro. Que Estate, 1. 3. 20. 47. (3 T. R. 147.)

As, if a tenant or defendant pleads a good bar; as, a feoffment, release, recovery, &c. by A., *que* estate he hath, it is good, without saying how he had the estate; for it is not material to the bar. Bro. Que Estate, 34.

And a plea of prescription for common, in a *que* estate, is good after verdict, though it be not in express terms alleged that the owners of the estate have used it from time immemorial. 3 T. R. 147.

So, a plaintiff may claim a thing which lies in grant by a *que* estate, when it is only conveyance to the thing in demand; as, he may say that he and all those *quor. stat. habet* in a hundred have had a leet, time whereof, &c.; though a hundred does not pass without deed; for it is only conveyance to the leet, which is demanded. Co. Lit. 121. a. Semb. 2 Leo. 74.

So, he may prescribe that a corporation, and all those whose estate they have in a house, have had a way, &c.; though a corporation cannot have without deed; for it is only conveyance. Per three Js. 2 Cro. 637. Vide 2 Vent. 139.

So, a plaintiff may allege a *que* estate, when the title is not in question; [\*] as, in trespass, if the defendant justifies the taking for rent due from the plaintiff, he may say that the lord enfeoffed A., *que* estate he himself has, to hold by 3s. rent; for the plaintiff is allowed tenant, and the title to the land is not in question. Bro. Que Estate, 6. 17.

So, he may claim a thing as appurtenant to a manor, by a *que* estate, though not of itself; as, toll, common, &c. R. 1 Mod. 231.

So, he may plead *que* estate in a stranger; as, the plaintiff in replevin may plead a *que* estate in the avowant in the seignior. Co. Lit. 121. a. Bro. Que Estate, 2. 12. 21. 26. 37.

An avowant for rent on a lease to A. may plead *que* estate the defendant has. R. Salk. 562. Hard. 459.

So, he may plead title by a *que* estate to an inheritance or freehold. Hard. 459.

So, he who comes to an estate in the *post.* may plead by a *que* estate ; as, a disseisor, abater, intruder. Co. Lit. 121. a.

So, a recoverer. Ibid. Bro. *Que* Estate, 41. 48.

So, a man shall plead title to an estate in fee by a *que* estate. 40 Ass. 28.

So, to an estate tail, with an averment of the life of tenant in tail. Co. Lit. 121. a. Bro. *Que* Estate, 7. 28. 29. 31.

So, to an estate for life, with an averment of the life of the tenant. Co. Lit. 121. a. Bro. *Que* Estate, 46. Hard. 459.

So, in the case of the king, where the plea goes in discharge of a debt assigned to the king, and shows the estate out of the debtor before the assignment. R. Hard. 459.

But, generally, he shall not plead a title to a term for years by a *que* estate. Co. Lit. 121. a.

As, to say that A. being seised, demised to B. for years, *que* estate he has. R. Dyer, 238. b. ; for he ought to show all mean assignments. R. Raym. 389.

Nor, to an estate at will. Co. Litt. 121. a. ; for it cannot be assigned. Bro. *Que* Estate, 38.

Yet, a man may avow for rent on a lease for years made to A., *que* estate the plaintiff has, without showing all mean assignments ; for he is a stranger to the assignments which might be without deed. Semb. Cro. El. 22.

So, he may have debt for rent or waste against an assignee, and declare on a lease to A., *que* estate defendant has, without showing the mean assignments. R. cont. Cro. El. 22. R. acc. 1 Sid. 298. 1 Lev. 190.

So, he may have covenant against the assignee of a term granted to A., *que* estate the defendant has. R. 3 Lev. 19.

So, if the defendant pleads a lease for years to A., *que* estate he has, and the plaintiff does not demur, but traverses the lease to A., whereby the assignment is admitted, it is good. R. Dy. 238. b.

So, if the plaintiff makes title to a term for years in himself by a *que* estate, it shall be aided on a general demurrer. Semb. Ray. 389.

If a *que* estate be pleaded, it ought to be alleged in the plaintiff or defendant himself ; as, to say the plaintiff and all *quorum statum habet.* Co. Lit. 121. b.

For, if it be alleged in one in a mesne conveyance, it is bad. Semb. Co. Lit. 121. b. Bro. *Que* Estate, 8. 19. 49.

[\*] But a woman, tenant in dower, may prescribe that her husband and his ancestors, *que* estate she has in the seignoiry, were, &c. though the husband had a fee and she not. Bro. *Que* Estate, 10.

Freehold tenant of a manor must plead prescription, and by way of *que* estate ; and not by way of custom, which is only for copyholders. Thomson v. Roberts, H. 5 G. 2. Fort. 339.

### (E 25.) When he shall plead to covenants specially.

If a man pleads to an action of covenant, where any of the covenants are negative, he ought to plead to them specially ; for the negative cannot be performed. Co. Lit. 303. b. R. Cro. El. 691. Mo. 856. Hob. 13.

As, if a covenant be to proceed on a voyage *et quod non deviaret*, he ought to plead specially that he did not deviate. R. 1 Sid. 87.

So, if the condition of a bond be in the negative, the defendant shall plead to it specially. 10 H. 7. 12. b.

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So, if the condition be for performance of covenants, and some of the covenants are in the negative, he ought to plead performance specially. *Semb. Dy. 373. a. Pal. 70.*

But general performance shall be aided on a general demurrer. *R. Cro. El. 232. 1 Leo. 311. Vide post, (E 26.)*

So, it shall be aided by the plaintiff's replication, that he has not performed, &c. *D. Sho. 1. a.*

So, if any of the covenants are in the disjunctive, he ought to show which he has performed. *Co. Lit. 303. b. Lut. 581. 10 H. 7. 12 b. R. 2 Cro. 560. Pal. 70. Sav. 120.*

So, if the condition be to pay at four days, or within six months after each feast. *Per two J. Cro. Car. 421.*

And if he does not, it will be bad on a general demurrer; for the court do not know what part is performed. *R. 1 Leo. 311. D. Cro. El. 232. Vide post, (E. 26.)*

So, if the condition of a bond requires several things to be done, it is not sufficient to say *quod performavit omnia*, &c., though all are in the affirmative; but he ought to answer specially to every particular mentioned in the condition. *R. 1 Lev. 303. Vide post, (2 W. 33.)*

{ So where the plaintiff in an action of covenant, assigns a particular breach, a general plea of performance, pursuing the words of the covenant, is bad on general demurrer. *Bradley v. Osterhoudt, 13 Johns. Rep. 404.*

The allegation in a plea in bar, that the defendant was ready at the time and place appointed, to perform his agreement, is sufficient. *Robbins v. Luce, 4 Mass. Rep. 474. }*

So, if an act required by a covenant is to be done by a stranger to the covenants; as, if B. covenants that A. and his wife shall levy a fine. *Per melior. opinion. 2 Rol. 159. R. 2 Cro. 559, 560. Dub. Pal. 70.*

That A. shall render a just account. *R. Sho. 1.*

And it shall not be aided by the plaintiff's replication, that he has not performed. *Ibid.*

So, if a covenant requires an act on record, he ought to show it specially. *Co. Litt. 303. b.*

As, if the covenant be that A. shall levy a fine. *R. 2 Rol. 159. R. 2 Cro. 560. R. Pal. 70.*

That the defendant shall become nonsuit in all actions by him, he must show specially that he was nonsuit; for it cannot be tried but by the record. *R. 13 H. 7. 19. b. acc. 10 H. 7. 12. b.*

So, if the condition be to make a bond, release, &c., it is not sufficient to say that he has done it, without showing it, whereby the [\*]court may judge whether it be sufficient. *R. Sal. 498. Vide Kit. 223. b. Lut. 421. Vide post, (2 V 13.) Ante, (E 5.—C 58, &c.)*

So, if the condition of a bond be to perform such a thing, or pay such a sum; it is not sufficient to plead payment generally without showing how or at what time, so that issue may be joined thereon. *R. 2 Cro. 360.*

If the condition be, that he shall prove a debt paid, it is not sufficient to say that A. and B. proved it, without saying how. *R. Bend. 66.*

So, if it be to perform a will, it is not sufficient to plead performance, without showing the will, and how he has performed it. *R. 2 Cro. 360. 2 Bul. 267.*

If he pleads, that a patent became void, he ought to show how. *R. Skin. 303.*

So, if a condition be to indemnify, plea, *quod exoneravit* is not good without showing how. R. 2 Cro. 363. R. 2 Cro. 165. 635. R. Mar. pl. 200. D. 2 Co. 4. a. Semb. Lut. 428. R. 2 Cro. El. 916. Mo. 857.

Otherwise, if he pleads in the negative *non damnificat*. R. Cro. 363. 634. Mar. Pl. 200. 2 Co. 4. Vide post, (2 W 33.)

So, if a covenant or condition be for quiet enjoyment; it is not sufficient to plead disturbance, without showing how he was disturbed. Semb. 2 Vent. 278.

And that it was by an elder title. R. Hob. 35. Win. Ent. 120. R. 2 Cro. 315. 444. R. Cro. Car. 5. 4 Co. 80. Vau. 120. Vide ante, (C 49.)

But it is not bad upon a special demurrer. Lut. 428.

And shall be aided after verdict. R. 2 Mod. 213.

### (E 26.) When generally.

But where all the covenants are affirmative, it is sufficient to show performance generally. Co. Lit. 303. b. 10 H. 7. 12. b. Vide post, (2 V. 13.)

So, in debt on a bond to perform covenants in an indenture, it is sufficient to plead performance generally, if they are all in the affirmative. R. Cro. El. 749. 2 Sand. 411. 1 Lev. 303. Dy. 373. a.

Or, if any are in the negative: but the negative covenants are all void and contrary to law; for the court will take notice that those in the negative are contrary to law. R. Mo. 856. R. Hob. 13.

Or, if the negative be but an affirmance of a precedent affirmative covenant. 1 Sid. 87.

So, though to an affirmative covenant negative words are added of the same import. Adm. 1 Sid. 87.

So, if he covenants that A. shall quietly enjoy without interruption, and discharged and acquitted of all incumbrances, he may plead *quod performavit* generally, though it is not so well. R. Lut. 608.

So, if a covenant be to make further assurance, be it by fine, seoffment, &c. as shall be advised, it is sufficient to plead *performavit* generally, though it is not so well. R. Lut. 609.

So, the plaintiff to a *plene administravit præter* a debt on a bond may say, that the bond was for such a purpose and that he has performed [\*]it, without saying that this was the whole of the condition. R. Lut. 1637.

So, where a covenant is affirmative and comprehends multiplicity of matter to avoid prolixity the defendant may plead performance generally, without showing how, and the plaintiff shall assign a particular breach; as, in debt on a bond with a condition to deliver the tallow of all beasts killed by him: it is sufficient to say that he has delivered all the tallow, &c. without saying how much he has delivered, or how many beasts he has killed. Cro. El. 749. Vide post, (2 V 13.)

So, on a bond to pay all rents received, it is sufficient to say that he has paid all, without saying what sum or how much he has received. R. Cro. El. 749. R. 1 Sid. 334.

So, on a bond to deliver all evidences, or to assure all his lands. Cro. El. 750.

So, where a man covenants to discharge all bonds. R. Cro. El. 916.

Or, to acquit of all escapes, fines, &c.; it is good without saying how. R. Mo. 857.

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Or, to indemnify against the king for all receipts as collector. Semb. Cro. El. 253.

So, if a man pleads performance generally, when some of the covenants are in the affirmative and others in the negative, it shall be aided on a general demurrer. R. Cro. El. 232. Vide ante, (E 25.)

Otherwise, if some of the covenants are in the disjunctive; for the court cannot judge what part he has performed. D. Cro. El. 232. Vide ante, (E 25.)

And, if he pleads payment or performance generally to the condition of a bond, it is not aided on a general demurrer. R. Mar. pl. 200. R. cont. 1 Lev. 194.

### (E 27.) The form of a plea in bar.

Every plea in bar must begin with the defence. R. Yel. 210. Vide for this in Abatement, (I 16.)

If a plea goes only to part, it must ascertain the part of the declaration to which it is applied; as, in debt for rent for several years, if the defendant says, *quoad* 20*l.*, parcel of rent *nil debet*, and does not show when the 20*l.* was due. R. 1 Sid. 338.

In *assumpsit* on several promises, if the defendant pleads *quoad* all except 4*l.* *non assumpsit*, and a tender *quoad* the 4*l.* and does not show upon which promise the tender was made, it is therefore bad. R. Lut. 241.

If the plea admits the cause of action, and avoids it by a discharge or matter *ex post facto*, he must say *quod* plaintiff *actionem non*, &c. R. Sal. 516.

But where there was no cause of action, he may say *onerari non debet*. Ibid.

{ Where a plea is put in which is a nullity, the plaintiff may either enter a default for want of a plea or demurrer. Falls v. Stickney, 3 Johns. Rep. 541.

But if the pleas are not palpably bad, on the face of them, the opposite party cannot treat them as nullities, but must demur. Coleman, 81.

Where a plea begins in abatement, and concludes in bar, it may be considered as a plea in bar; and if a demurrer to such a plea, conclude in bar, the judgment will be final. Schoonmaker's Exrs. v. Elmendorf, 10 Johns. Rep. 49. }

### (E 28.) How it shall conclude :—To the action.

Every plea shall have its proper conclusion; and therefore a plea in bar shall conclude to the action. Co. Lit. 303. b. Vide Abatement, (I 12.)

A plea showing a disability in the plaintiff to sue, or other matter of defence accrued since action brought, must pray judgment against the further [\*] maintenance of the action, and not against maintaining it generally. 4 East, 502. { Vide Covell v. Weston, 20 Johns. Rep. 414. Hutchinson v. Brock, 11 Mass. Rep. 119. Levine v. Taylor, 12 Mass. Rep. 8. }

But sometimes a conclusion is aided on a general demurrer; as, if it be only informal. D. Hob. 298. 321.

Or, prays judgment of the writ where it should be *si serra respondue*. Semb. Latch. 179.

A plea in the common form, and not against the further maintenance of the suit, goes to the time of action commenced, not of plea pleaded. 4 East, 502.

A plaintiff, who is only entitled to judgment against the further estate and effects of the defendant, for instance, a bankrupt or insolvent, cannot, in pleading, pray  
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judgment generally, but must confine it to the future estate and effects. 2 M. & S. 549.

If a plea begins in abatement and concludes to the action, it shall be a plea in bar. Sho. 4.

### (E 29.) To the record.

And if a matter of record be pleaded, it shall conclude *prout patet per recordum*. 1 Lev. 211. R. 3 Lev. 334. Vide ante, (C 82.)—Post, (O 17.)

So, if a matter be pleaded proveable only by a record. R. Lut. 163.

And if it concludes, *et hoc paratus est verificare*, when it ought to be *prout patet per recordum*, it is bad. R. Ray. 50.

Or, if it concludes to the country, when it should conclude to the record. R. 1 Leo. 90.

Or, if it adds matter of fact, and then concludes to the country. R. Lut. 1272.

If several records are pleaded, it must conclude every one *prout patet per recordum* of such court; for, after pleading all, to say, *prout patet per recorda prædicta*, is bad, at least if it does not say, *prout patet per separat. recorda prædicta*. Per two J. 2 Cro. 626.

But, *per separat. recorda* is good. R. 1 Lev. 200. 1 Sid. 333.

But where a general statute is pleaded, there is no need to say *prout patet per recordum*; for the judges take notice of it. R. Hard. 335.

So, if the defendant *profert* the record by his plea, he need not say *prout patet*, &c. Skin. 520.

If matter of record be pleaded by way of dilatory, if of another court, it must be *sub pede sigilli*; if of the same court, not. Curwen v. Fletcher, P. 8 G. Str. 520.

To action on the case, if defendant pleads a recovery, and plaintiff replies *nil tiel record*, and concludes with averment, it is good, especially if it is a record of another court; but (semb.) he may also conclude with giving a day to defendant to produce record. Sandford v. Rogers, H. 33 G. 2. 2 Wils. 113.

Yet by the stat. 4 & 5 Ann. 16. no exception shall be taken for want of *hoc paratus est verificare per recordum*, or *prout patet per recordum*, unless specially shown for cause of demurrer.

And it was before aided on a general demurrer; for the party might say, *nil tiel record*, notwithstanding the omission. 1 Sal. 1.

So, it is not necessary to conclude *prout patet per recordum*, where the plea is in the negative. Sal. 520. Vide post, (E 33.)

When it shall conclude to the country. Vide post, (E 32.)

### [\*](E 30.) Special conclusion :—*Et sic*.

If a plea does not avoid the plaintiff's demand but by argument, there ought to be a special conclusion; as, in a *scire facias* for the arrears of an annuity against a parson, if the defendant pleads that he has resigned; it is not good without saying, *et sic not parson*. Hit. 214. b. 220. b.

So, in debt for rent, or upon a contract, if the defendant pleads payment in the same county; it is not good without concluding, *et sic nil debet*. Ibid. 220.

So, in debt on a bond, if the defendant pleads special matter, which proves the bond to be void, he ought to conclude, *et sic non est factum*; as, if he pleads rasure or interlineation. Ibid.

That the obligor was a *feme covert*. Ibid. 220, b.

[\*129]



That the defendant is unlearned, and it was read in other form. *Ibid.* 220.

But if the special matter of the plea be a sufficient bar, there is no need to say *et sic*; as, in debt for rent, payment, or levy by distress, in another county, is sufficient, without concluding *et sic nil debet*. *Ibid.*

So, if the defendant acknowledges the deed, and pleads a plea to avoid it, he cannot conclude *et sic non est factum*; as, if he pleads duress, within age, &c. he cannot conclude *et sic non est factum*. *Kit.* 220. a. b.

If a plea concludes with *et sic*, &c. in the affirmative, this does not waive the special matter. *Co. Lit.* 303. b.

As, if he pleads specially that A. was born between B. and his wife before their marriage, *et sic a bastard*. *Pl. Com.* 14. b.

In formedon, if the tenant pleads *ne dona*, to which the plaintiff replies recovery in value by reason of a warranty, *et issint dona*. *Pl. Com.* 15. a.

So, if he pleads special matter, and concludes with *et sic* on the general issue, this does not waive the special matter; as, if he pleads unlearned, and read in other form, &c. *Et sic non est factum*. *Ibid.*

But generally, where the conclusion *et sic* goes to the point of the writ or action, the special matter is waived. *Co. Lit.* 303. b.

Or, if a plea concludes with *et sic* in the negative. *Co. Lit.* 303. b. *Pl. Com.* 15. a.

### (E 31.) *Quæ est eadem.*

So, in trespass, if the defendant justifies the trespass in another place or at another day, he ought to conclude which is the same trespass. *R.* 1 *Bul.* 138. 9 *H.* 6. 30. a.

So, in conspiracy, if the defendant justifies, he ought to conclude that it is the same conspiracy. *Kit.* 237. b.

So, in an action for an escape in London, if the defendant justifies by a re-taking on a fresh suit in Surry, which is the same escape, it is good. *Latch.* 201.

So, in *quare impedit* on an avoidance by deprivation, if the defendant pleads a deprivation, after which the church lapsed, &c., he ought to conclude, which is the same deprivation. *Dy.* 293. a.

So, in trespass and imprisonment till he paid 10s., if the defendant justifies till payment of 11s. *Skin.* 664.

[\*] If the defendant justifies in another place, and says, which is the same, &c.; it will be good, where the place is not material, without a traverse. *R.* *Cro. El.* 667.

And if the defendant justifies upon another day, and concludes, which is the same, &c. when the day is not material; it is good without a traverse of the day. *R.* 1 *Lev.* 241. *R.* *Cro. Car.* 228. *R.* *Lut.* 1457. *Semb.* 2 *Jon.* 146. *R.* *Sal.* 641.

And, if he adds a traverse, which is defective, it does not prejudice. *Sal.* 641, 2.

But, if he justifies at the same day, and in the same place, he need not say, which is the same. *R.* *Skin.* 387.

So, if the defendant does not justify the trespass, but only excuses himself, he ought not to say, which is the same.

So, in trespass for false imprisonment, if the defendant pleads that he brought the plaintiff to S. with his consent, he cannot say, which is the same imprisonment; for it is no imprisonment if it be not against his will. *Kit.* 237. a.

Or, if he pleads that he advised A., being in fear of his life from the plaintiff, to go to a justice of peace for a warrant, and by such warrant he was arrested, he cannot say which is the same, &c.; for he was not imprisoned by the defendant, but by A. R. 12 H. 7. 14. b.

So, if the defendant, in debt upon a bond, pleads *per minas*, if the plaintiff replies that he said, if the defendant would not give him a bond for the rent due he would sue him; he ought not to say, which is the same menace; for it is not a menace, but lawful. Kit. 237. b.

So, in maintenance, if the defendant says that he feed counsel, he cannot say, which is the same, &c.; for this is no maintenance. Ibid.

So, in trespass for an assault, battery, and wounding, if the defendant justifies a taking by a warrant, which is the same assault, battery, and wounding it is not good; for this does not go to the wounding. 21 H. 7. 39. Vide post, (3 M 15.)

In trespass for an assault and imprisonment, it is not sufficient to say that the defendant showed the plaintiff to an officer who had process against him, who thereupon arrested him, without saying that he requested the officer to arrest; for, without such request, it is no confession of the imprisonment. R. 4 Ed. 4. 36. a.

In trespass for taking and carrying away his goods; if the defendant justifies a taking in execution and removal, which is the same, it is no answer to the carrying away, without saying to what place they were removed, and where left. R. Lut. 1486.

So, a plea, which is a general bar, shall conclude to the action generally; as, a fine with proclamations. R. Dal. 68.

But, where the matter of the plea is a bar only by estoppel, he ought to rely on the estoppel; for it is a special conclusion between the parties; as, if he pleads a collateral warranty. Dal. 68.

### (E 32.) When it shall conclude to the country.

When there is a complete issue between the parties, viz. a direct negative and affirmative, the plea shall conclude to the country; as, in *assumpsit*, if the plaintiff declares upon a submission to an award, and that such an award was made, and that the defendant has not performed [\*]it; if the defendant pleads, no such award, he ought to conclude to the country. R. 2 Sand. 337.

So, if the plaintiff alleges that the award was tendered to the parties, &c., and the defendant answers, that it was not tendered *modo et forma*, he ought to conclude to the country. R. 2 Sand. 190. Lut. 528.

So, in debt on a bond, with a condition to pay all expenses; if the defendant pleads that he paid all, and the plaintiff replies, that he has not paid, he ought to conclude to the country. R. Ray. 98.

So, if the defendant pleads, *plene administravit*, and the plaintiff replies, assets at the time of the original, he ought to conclude to the country. Semb. Lut. 101. R. Yel. 137.

So, if the plaintiff in an *audita querela* alleges tender at the day, and no one ready to receive, and the defendant pleads, ready, and traverses the tender, it is bad; for he ought to conclude to the country; for he should have been ready to receive at the day, whether it was tendered or not. R. 2 Cro. 14.

Though the payment by a defeasance ought to be to a stranger. 2 Cro. 14.

So, in trover, for selling a chain of gold, and converting the money to his own use, if the defendant pleads *non vendidit*. R. 1 And. 20.

So, in *assumpsit*, for payment of money at such a day, if he pleads *solvit ad diem*. R. Sal. 516.

So, in covenant, if the plaintiff assigns the breach, *quod non solvit*, &c., and the defendant pleads, *quod solvit*. R. Carth. 88.

So, he ought to conclude to the country, though matter of record be mentioned in the plea; as, if it be alleged that the plaintiff procured letters patent, and he says that he did not procure; for the procurement is the principal thing. R. 3 Mod. 79.

{ So, where it was averred in the declaration that the plaintiff gave to the defendant, a good and sufficient deed, and the defendant merely denies, that the plaintiff gave such deed, and concludes with a verification, it is bad. *Gazley v. Price*, 16 Johns. Rep. 267. }

Plea of bankruptcy ought to conclude to the country. *Gery v. Bayley*, M. 7 G. *Miles v. Williams*. *Fuller v. Byng*, C. B. T. 3 G. Fort. 334. *Barnes*, 330.

If to covenant by an executor, defendant pleads another executor, who has proved, administered, and is still living, plaintiff's replication shall conclude to the country. *Wilkins v. Brown*, H. 18 G. 2. Str. 1220.

Bond that A. on thirty days' demand in writing, should account and pay; breach assigned, that A. did not account in thirty days after demand in writing; pleas, 1st, no demand; 2d, (protesting no demand, &c.) that A. did account and pay; replication, that a demand in writing was made on a day, (naming it,) and no account by A.; this concludes well to the country. *Trapaud v. Mercer*, T. 33 & 34 G. 2. 2 B. M. 1022.

As, a replication denying the whole substance of a plea of the stat. 23 H. 6. c. 9. ought to conclude to the country; and if it concludes with a verification, it is bad on special demurrer. *Boyce v. Whitaker*, B. R. H. 19 G. 3. Doug. 94.

Where a marriage has been solemnised abroad, so that the court cannot send a writ to any bishop, the lawfulness of the marriage must of necessity be tried by a jury; and therefore the replication of *ne unques accouple* must conclude to the country. 2 H. B. 145.

So, if the defendant pleads a fact merely in the negative, he ought to conclude to the country; for a negative cannot be averred.

So, if a plea concludes with a special negative to the affirmative in the declaration; as, in debt on a bond, if he pleads a special *non est factum*, as, a delivery as an escrow. R. 1 Sal. 274. [Ld. R. 787.]

But when a plea may have an answer to it, it shall not conclude to the country; as if the defendant pleads the statute of limitations, [\*] and the plaintiff shows another original sued out, he shall not conclude to the country; for he cannot take away the defendant's liberty of answering it. R. Lut. 101. R. 4 Mod. 376. Vide Action upon *Assumpsit*, (H 7).

If the defendant pleads alien enemy, and the plaintiff replies, born at London and no alien. R. 4 Mod. 285.

If plaintiff replies, not an attorney, he must not conclude to the country. *Barker v. Forest*, M. 9 G. Str. 532.

Where a replication denies the whole substance of the defendant's plea, the plaintiff may tender issue and conclude to the country. But where he selects one out of several facts, he may traverse that one, and conclude with a verification. To the first branch of the rule, there are exceptions established by usage and precedent. 2 T. R. 439. Dougl. 430.

So, where there is not a direct negative and affirmative, he need not conclude to the country; as, if an avowant says an office was granted to such person or persons as the bishop pleased, and the plaintiff replies in bar, that it was granted only to one. R. 10 Co. 59. a.

If the plaintiff says, that the defendant received 20l. for which he did not

account; the defendant pleads that he accounted *modo sequen. viz.* that he was robbed of it, and gave notice to the plaintiff. R. 2 Lev. 5.

And if a plea does not conclude to the country when it ought; it is error. R. Yel. 58.

Also, if a plea does not conclude to the country when it ought, it is bad on a general demurrer. R. 2 Sand. 190. Semb. Ray. 94. 98. R. Cro. Car. 164. R. Sho. 70.

Yet, it was shown for cause of demurrer. 2 Sand. 337.

And it seems to be only form, and not bad on a general demurrer. Per Hale, 1 Vent. 240.

But it is bad on a special demurrer. R. Lut. 21.

So, if a plea concludes to the country, when it ought not, it is bad. R. on a general demurrer. Lut. 101. 1272. R. 1 Sid. 215.

Yet, if the other party joins issue, and a verdict is obtained, it is aided by the st. 32 H. 8. R. 2 Cro. 580. 589. R. Cro. Car. 317. R. 1 Sid. 341. a.

### (E 33.) When it shall be averred.

All pleas in the affirmative ought to be averred by *et hoc paratus est verificare.* Co. Lit. 303. a. { Service v. Heermance, 1 Johns. Rep. 91. }

So, ought a replication. Cro. El. 256.

So, pleas in abatement. R. 1 Vent. 264. R. Lut. 1466.

So, a plea to an English bill in the exchequer. Hard. 160.

So, a traverse of a particular matter *absque hoc*, &c. ought to conclude with an averment, *et hoc paratus est verificare.* 1 Sal. 4. R. 5 Mod. 203. F. g. 130.

Yet, where *absque hoc* comprises all the matter of the plea, as *absque tali causa* does, it may conclude to the country. R. 1 Sal. 4.

If a writ is pleaded, it shall conclude, *et hoc parat. est verificare.* Baxter v Douglas, H. 8 G. Fort. 334.

So, if defendant in *indeb. assump.* pleads *infra etat.* Cross v. Bevan, M. 13 G. Fort. 334.

If a person charged as occupier of the goods of a debtor to the crown, [\*]pleads that he is not occupier, he must conclude with *et hoc parat.*, &c. Bunb. 331.

If plaintiff in his replication discloses new matter, the rejoinder must answer it, and conclude with averment. Thus, debt on bond, conditioned that A. should not run away during his apprenticeship; plea, A. did not run away; replication, A. was bound for seven years, and did run away before the end of them; rejoinder, A. was bound for five only; it must conclude with averment. Long v. Jackson, M. 27 G. 2. 2 Wils. 8.

If on *scire facias* against bail, defendant pleads principal died before return of any *ca. sa.* against him; replication, *ca. sa.* returned, and he then living, must conclude with averment. If it concludes to the country, by denying his death, or with a traverse, it is bad; for it deprives defendant of right to rejoin, no *ca. sa.* And where either party introduces new matter, (as here the *ca. sa.*) the other must have an opportunity of answering it. Filewood v. Popplewell, P. 30 G. 2. 2 Wils. 61. 65.

If to a plea of performance generally to an action on a sheriff's bond, the plaintiff reply a particular warrant, and that the defendant ought to have made due return, &c., but neglected, &c.; he ought to conclude with a verification. Cowp. 575.

So, if to a *sci. fa.* against bail, the defendants plead that the principal died before the return of the *ca. sa.* and the replication state a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.*; it ought to conclude with an averment. Doug. 58. 2 T. R. 576.

And it is a general rule, that wherever new matter is introduced, the plea, &c.

[\*133]

must conclude with an averment, because the other party must have an opportunity of answering it. Doug. 60. Ibid.

It is also a general rule, that where the plaintiff selects one out of several facts in the plea, he may traverse that one and conclude with a verification: but where a replication denies the whole substance of the plea, the conclusion may be to the country. Doug. 430. 2 T. R. 439.

Yet there are exceptions introduced by practice, where the conclusion is good either way. Ibid.

If the plea is, that A. did pay all he received, and the replication narrows it to a particular sum, that he did receive 1400*l.* which he did not pay, it shall conclude with averment. Cornwallis v. Savery, P. 32 G. 2. 2 B. M. 772.

A replication to a plea of gaming, to debt on bond, that the bond was for money justly due, and not for securing money won at play, may conclude either with a verification or to the country. 2 T. R. 439.

In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence thereof, the plaintiff may formally traverse the usurious agreement, and conclude with a verification. Dougl. 428.

But pleas in the negative need not be averred. Co. Lit. 303. a.

As, in *assumpsit* by an attorney for fees, if the defendant pleads, no bill delivered under his hand pursuant to the statute 3 Jac., there is no need of an averment. R. Sho. 338.

So, to a *scire facias* upon a recognizance against bail, if the defendant pleads that the judgment is pending and not determined, he need not say *proul patet per recordum*. R. Sal. 520.

So, an avowry need not be averred; for it is in the nature of a count. Co. Lit. 303. a. R. Pl. Com. 342. a. 163. a. Vide ante, (C 51.)

So, the general issue need not be averred; for it is not traversable, but the plaintiff ought to join issue or demur. Kit. 219. b.

So, a challenge of an array need not be averred. 27 H. 8. 13. b.

So, a demurrer need not be averred, *et hoc paratus*. R. 1 Leo. 24.

[\*] *Nul tiel* record need not be averred. Obin v. Knott, M. 9 G. 2. Fort. 339.

If defendant in trespass for taking trees, justifies under a license, and avers the trees were used for gates, &c.; and replication traverses the license, protesting the trees were not used for gates, it may conclude to the country, and not with averment. Robinson v. Raley, P. 30 G. 2. 1 B. M. 316.

Default or omission of an averment in the conclusion of a plea, is but form, and does not prejudice on a general demurrer. R. Lut. 16. Cont. Jon. 406. R. cont. Lut. 1466. Semb. acc. 1 Vent. 240. R. acc. Skin. 340.

And now, by the st. 4 & 5 Ann. 16., no exception shall be taken for want of averment by *et hoc paratus est verificare*, unless shown for cause of demurrer.

But it is bad on a special demurrer. R. Lut. 21.

### (E 34.) Must be triable.

Every plea ought to be triable. Co. Lit. 303. b.

And therefore must consist of matter of law, which is determinable by the court; or matter of record, which is triable by the record; or matter of fact, which is triable by the country. 9 Co. 24. b.

And if fact is complicated with matter of law, so that it cannot be tried by the court, or jury, the plea is bad: as, if the defendant pleads that A. *licite gavisus fuit bona felon.*, it will be bad; for the jury cannot determine whether he lawfully enjoyed, nor the court whether he enjoyed. R. 9 Co. 25. a. [\*134]



And therefore, that defendant was always ready to pay, (without pleading tender, is bad. *French v. Watson*, T. 30 & 31 G. 2. 2 Wils. 74.

So, if the condition of a bond be, that he will show a sufficient discharge of an annuity, it is bad, if he pleads that he showed a sufficient discharge; for the jury cannot try whether it is sufficient; but he ought to show what discharge he gave, and the court will judge whether it be sufficient. 9 Co. 25. a.

But where the effect of the words represents a matter triable, it is sufficient, though according to the letter it is not triable; as, in covenant for enjoyment free from arrears of rent: plea, that he delivered money to the plaintiff *ea intentione* that he should discharge the arrears, will be good, though the intent is not triable; for it is tantamount as if he had said that he delivered *ad solvendum*. R. 4 Mod. 249.

The rule, that where a defendant is under terms of pleading issuably, he cannot put in a plea which does not go to the merits, cannot be dispensed with in any instance. 2 T. R. 394.

The term "pleading issuably," in a judge's order, means, not merely a plea on which issue may be taken, but one that goes to the merits, and is not for delay. 8 T. R. 71.

A plea by a defendant, under terms of pleading issuably, cannot be treated as a nullity, because defective in its form. 5 T. R. 152.

A plea which is not an answer to the whole declaration, and cannot, from its uncertain form, be applied to any particular part of it, may, when the defendant is under terms of pleading issuably, be treated as a nullity. 3 B. & P. 174.

Where a defendant, under terms of pleading issuably, pleads non-issuably on any part of the plaintiff's demand; for instance, demurs specially to part, the plaintiff may sign judgment for the whole. 1 East, 411.

[\*] A tender is an issuable plea, within the terms of pleading issuable under a judge's order. 1 H. B. 369.

A defendant under terms of pleading issuably may plead the statute of limitations. 3 T. R. 124. Overruling, as to this matter. 2 T. R. 390.

If a defendant in an action, on a recognizance of bail under a judge's order to plead issuably, plead, 1. *nul tiel* record; 2. that no *ca. sa.* was sued out against the principal; such pleas may be considered as issuable. 1 Moore, 430.

A plea by the bail of a member of parliament, under st. 4 Geo. 3. c. 33. that error is pending on the judgment against their principal, is in bar, and is an issuable plea within a judge's order. 2 H. B. 372.

A demurrer on the merits, is an issuable plea within the meaning of an order for time. 2 Blk. 923. 3 Wils. 530.

The plea of alien enemy, is not an issuable plea within a judge's order. 8 T. R. 71.

Judgment recovered in another court, if false, is no plea when under terms of pleading issuably. 3 Wils. 33. 1 Blk. 576.

A special demurrer, though not merely for delay, is not allowed when under terms of pleading issuably. 2 B. & P. 446. So, that if a defendant, under terms of pleading issuably, puts in a special demurrer, the plaintiff may sign judgment. 7 T. R. 530. 3 Burr. 1788.

It is a high contempt to raise a difficult question of law by a sham plea. 1 Taunt. 224.

{ So, a plea of usury, containing averments, part of which are to be tried by a jury, and part to be verified by the oath of the party, is bad. *Binney v. Merchant*, 6 Mass. Rep. 190. }

(E 35.) Form of pleading:—When several defendants, &c.

If there are several defendants, they may join in a plea. Sal. 456.

Or, may plead severally. Ibid.

[\*135]



If they sever in plea, the plaintiff may enter a *non pros* against one, at any time before the record is sent down to the assises. R. Sal. 457.

In *assumpsit*, if defendants sever in pleading; one pleads to issue, and there is judgment against him; the other pleads bankruptcy, and plaintiff enters *nolle prosequi*: this does not destroy the action against the first. *Noke v. Ingham*, P. 18 G. 2. Wils. 89.

{ It seems, that several defendants cannot plead severally except in actions for torts. *Meagher v. Batchelder*, 6 Mass. Rep. 444. }

If the defendants join in the plea, and it is in the singular number, it will be bad. R. Lut. 1531.

And this on a general as well as a special demurrer. Semb. Ibid.

If the defendants plead severally, the plaintiff may demur to one, and join issue on the other. Cro. Car. 243.

And may afterwards enter a *nolle prosequi* on the demurrer, and proceed on the other. Ibid.

Or, if several issues are joined, he may enter a *nolle prosequi* as to one, before judgment or after. Ibid.

Though they are charged jointly. Ibid.

If the defendant pleads to a general demand or charge, he ought to answer to every part; as, in waste for cutting down twenty oaks, the defendant ought to say, that he did not cut down them or any of them. Cro. El. 84.

But if a collateral issue be tendered, it is sufficient to answer in the words of the plaintiff; as, in account, if the plaintiff charges that the defendant received 100*l.* *ad computandum*, and the defendant says, that he expended the said 100*l.*, it is sufficient to say that he did not expend [\*]the 100*l.* without saying *nec aliquem partem inde*; though if he expended part, he ought to be allowed it. Cro. El. 84.

In trespass against two, if one suffers judgment to go by default, and the other justifies for a distress for rent, and license from the plaintiff to sell, and a verdict for defendant, judgment shall be arrested as against the other. *Biggs v. Bonger*, M. 11 G. 2. Ld. Raym. 1372. Str. 610.

A plea goes to the time of action commenced, and of plea pleaded. Therefore, a plea of set-off that the plaintiff was indebted before and at the time of plea pleaded, is bad. 3 T. R. 186. overruling *comme semble*. Dougl. 112.

Where a party having an opportunity, neglects to rely on a defence, he waives it. 1 T. R. 80. Hence, if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. 3 T. R. 639.

### (E 36.) Plea bad in part, is bad for the whole. a.

If an entire plea is bad in part, it is bad for the whole; as, in trespass, if the defendant justifies, as servant to B., his entry to take care of the cattle there, and does not say that he put the cattle there, this is a good justification of his entry, but is not a justification with cattle; for if he did not put them there, he is not guilty, and then, he cannot justify; and the plea being bad in part, is bad for the whole. R. 1 Sand. 28. Vide post, (F 25.)

{ To a declaration containing a count for a libel, and counts for slander, the defendant pleaded the statute of limitations; this plea was held bad as to the first count; and being bad in part, was bad for the whole. *Miller v. Merrill*, 14 Johns. Rep. 348. Vide *Perkins v. Burbank*, 2 Mass. Rep. 82. Per PARSONS, Ch. J.

So where several defendants join in a plea in bar, if the plea be bad as to one defendant, it is bad as to all. *Moors v. Parker*, 3 Mass. Rep. 310. }

In *assumpsit* on several promises, if the defendant pleads the statute of limitations, which is a bad plea as to one count, where the action does not arise upon the promise, but not as to the other count ; it will be bad for the whole. R. 1 Lev. 48.

In debt against an executor or administrator, if the defendant pleads several judgments and no assets ultra ; if the plea is bad as to one of the judgments, it will be bad for the whole ; as, if one of the judgments was against the testator and B., and he does not show that the testator survived, for otherwise he shall not be charged with it. R. 2 Sand. 50.

In covenant and several breaches, if defendant pleads outlawry in bar, which is a bar for one breach, and not for the others, it will be bad for the whole. R. Lut. 515.

If an attorney puts in court a plea notoriously false for delay, it will be a breach of his oath. for which he may be fined. Sal. 515.

But an attorney is not bound to swear his plea, but where it is a foreign plea. Sal. 515.

The rule of pleading, that a plea or replication bad in part, is bad in whole, does not apply where the part which is defective is surplusage ; as, where in a replication to debt on bond, a breach is assigned in the nonpayment of two sums, to one only of which the plaintiff is entitled. 3 T. R. 374.

### (E 37.) When it shall be aided.—By the replication.

A bad bar may be aided by a replication ; as, if the defendant in assize pleads a feoffment upon condition, and entry for the condition broken, without showing the deed, as he ought ; if the plaintiff replies, that after the feoffment and entry he re-enseffed him, this confession [\*] in the replication aids the defect in the bar. Pl. Com. 230. b. Vide ante, (C 85.)

So, if the plaintiff replies, that before entry the defendant released to him. Ibid.

So, in debt on a bond to make an estate to A., if the defendant pleads that he enseffed another to the use of A., which is not good without showing that A. was a party or had the deed, &c. ; yet if the plaintiff replies, that he did not enseff, this aids the bar. R. Cro. El. 825.

So, if on a bond to accept a lease on request, the defendant pleads *non requisivit*, the plaintiff replies that he tendered a lease without saying of what lands, and issue is joined on the request, this aids the defect in the replication. R. Cro. Car. 560.

So, if the defendant pleads an award, &c. uncertainly, and the plaintiff makes a replication, which imports the award, &c. to have been made, it aids the uncertainty of the bar. Vide Kit. 238.

So, if the defendant pleads a judgment without saying *prout patet per recordum*, and the plaintiff by his replication, says, the judgment is fraudulent. R. 3 Lev. 311.

So, if the plaintiff by his replication, shows that he has no cause of action, there shall be judgment for the defendant, though the bar is defective ; for the court will judge on the whole record ; as, in escape at London, the defendant pleads a retaking upon fresh suit at Stoke, the plaintiff replies that he was out of his view before the retaking, this admits the retaking on fresh suit, and then he shall not have an action for an escape ; though retaking at another place would be a bad plea on a demurrer. R. 3 Co. 52. b.

But a bar, which wants substance, cannot be aided by a replication. D. 8 Co. 120. b.

As, if the defendant pleads an agreement, and does not show a satisfac-  
[\*137]

tion, if the replication denies the agreement, this does not aid the bar. Kit. 237. b.

On demurrer the court looks for the first fault; therefore, if to debt on bond defendant pleads payment before the day, it is not made good by plaintiff's replying and tendering issue. Anon. H. 3 G. 2 Wils. 150. < Vide Pearsall v. Dwight, 2 Mass. Rep. 84. Dyer v. Stevens, 6 Mass. Rep. 389. Ainslie v. Martin, 9 Mass. Rep. 454. United States v. Arthur, 5 Cranch, 257.

So, where the defendant pleaded, generally, that he became bankrupt within the intent and meaning of the statute; and that he obtained a certificate of discharge from the commissioners &c. it was held, that although the plea would have been bad on demurrer, it was cured by a replication alleging, that the certificate was obtained by fraud. Jenkins v. Stanley, 10 Mass. Rep. 226. Vide Spear v. Bicknell, 5 Mass. Rep. 125.

So, if the defendant plead by a wrong name, the defect will be cured by the replication. Hutchinson v. Brock, 11 Mass. Rep. 119. >

### (E 38.) By verdict.

So, a bad bar or replication cannot be aided by a verdict; as, if the defendant prescribes for a common, and justifies *utend. communia prædicta*, but does not show that the cattle were *levant* and *couchant*, or put therein at a proper time; this shall be intended after a verdict for the prescription. R. Cro. El. (458.) R. 2 Cro. 44. Vide ante, (C 87.)

{ Defects in matters of form, are cured by verdict. Waldin v. Payne, 2 Wash. 1. Payne v. Ellzey, 2 Wash. 143. Hunnicutt v. Carsley, 1 Hen. & Manf. 153.

But where a party totally omits to aver a matter necessary to the action or defence, and not implied in the allegations made, the defect will not be cured. Griffin v. Pratt, 3 Conn. Rep. 513. }

In prescribing for common as appurtenant to a messuage, it shall be understood, after a verdict, that land was included in the term messuage. Scholes v. Hargreaver, B. R. M. 33 Geo. 3. 5 T. 46.

If the defendant justifies as assignee of a reversion for rent in arrear, and issue is upon nothing in arrear; and it is found so, the defect of attornment to the grant in reversion shall be aided. R. 2 Lev. 234.

So, if the defendant pleads an insufficient plea, whereon issue is joined, and a verdict for the plaintiff; no advantage shall be taken by the defendant of his bad pleading. R. 5 Mod. 227. Vide Amendment, (P).

[\*] So, in replevin, a plea of prescription for common in a *que* estate is good after verdict, though it be not in express terms alleged that the owners of the estate have used it from time immemorial. Clark v. King, B. R. E. 29 G. 3. 3 T. R. 147.

### (E 39.) By the statute of jeofails.

By the st. 8 H. 6. 12. misprision of a clerk, and after verdict, by the st. 32 H. 8. 30. mispleading, lack of colour, insufficient pleading, or other defect of the party, and by the st. 16 & 17 Car. 2. 8. defect in form, mistake of name, sum, or time, or other matter of like nature, not being against the right of the suit or whereby issue or trial is altered, shall be amended. Vide Amendment, (K 2.—L 2.—M).

But no substance is within any of the statutes of jeofails. By Buller J. Ward v. Honeywood, B. R. H. 19 Geo. 3. Doug. 63.

What shall be a misprision or defect in form. Vide Amendment, (T 1. &c.—W).

After a plea delivered, and before entry on the record, it may be amended on notice and payment of costs. Pr. Reg. 19. Sal. 520.

Though it be three terms after. Pr. Reg. 408.

So, a defendant before issue or demurrer may waive a special plea, and take the general issue. Salk. 515.

Not, after a rule to plead peremptorily or demurrer to his plea. Ibid.

And there shall not be a rule for a peremptory plea till the rules are expired. Sal. 516.

If defendant pleads *nil debet* to debt on bond for performance of covenants the court will permit him to waive his plea after rejoinder in demurrer, and, to plead performance, on putting plaintiff in as good condition as if he had pleaded right at first. *Herbert v. Griffiths*, H. 16 G. 2. Str. 1181.

So, if a declaration be amended after a plea, the plea may be altered. Pr. Reg. 409.

So, a plea may be waived by the consent of the plaintiff's attorney, without motion. Pr. Reg. 423.

Or, if the attorney will not consent, by rule of court on motion; if it be no prejudice to the plaintiff. Ibid.

But after the plea is entered on record, it cannot be amended. Pr. Reg. 415.

#### (E 40.) To whom a plea shall be delivered.

The plea ought to be delivered to the plaintiff's attorney or clerk. C. Att. 297.

Or, if he is not known, or refuses to accept it, it may be left in the prothonotary's office. C. Att. 297. Pr. Reg. 418.

In C. B., if the general issue be pleaded, the defendant's attorney signs the plaintiff's attorney's dogget, who, thereupon makes a copy of the issue, and delivers it to the defendant's attorney, who pays for the entry and the book. C. Att. 40. Vide post, (R 11.)

If the plea be special, it must be delivered under the hand of a serjeant or counsel. C. Att. 40.

Counsel ought not to sign a frivolous plea. Sal. 517. b.

#### [\*] (E 41.) At what time.

If the defendant has not an imparlance, he must plead the same term, or within fourteen days after. C. Att. 295.

Or, at least, if the plaintiff gives a rule to plead, he must plead before the *essoign-day* of the next term. Mod. Ca. 22.

Declaration *de bene esse* is necessary to take advantage of the term, if the writ is of first or second return, where defendant is to plead without imparlance, but not otherwise. Barnes, 91.

So, if there be an imparlance, he must plead within four days after the beginning of the next term.

If a declaration be delivered before the *essoign-day* of the term after the process is returnable, and rule given the next term, he must appear and plead before the rule expires.

The rule that defendant must plead in eight days from declaration filed, applies where it is filed on the *essoign-day*. 1 Taunt. 22.

So, he has the whole term to plead in abatement. Sal. 515.

Formerly the rules to plead ran for eight days, and the four first only were allowed for pleas in abatement; but pleas in chief were sufficient, if they came in before judgment signed. In Trin. 6 Geo. 2. the time of pleading was shortened to four days, and no provision for any distinction between the two sorts of pleas; but this

does not enlarge the time as to pleas in abatement, which must still come in within the four days, and cannot be received after. *Long v. Miller*, T. 16 G. 2. Str. 1192. Wils. 23. *Anderson v. Baddislade*, P. 20 G. 2. Str. 1268.

Rule of C. B. as to the time allowed for pleading, where the process is returnable the last return of the term. Hil. 35 Geo. 3. 2 H. B. 550.

If a declaration be delivered *de bene esse* on or before the appearance day; the defendant shall have four days to plead in from the appearance day; if delivered after the day of appearance, then four days from the delivery. 2 Blk. 1243.

A declaration filed *de bene esse* on process returnable the last return of the term, with notice to plead within the first four days of next term, is regular. 1 H. B. 533.

If *oyer* is not delivered in time, defendant has as many days to plead after the rules are out, as he demanded *oyer* before the rules were out. *Powel v. Gay*, T. 12 G. Str. 705.

Defendant has as long time to plead after *oyer* given, as he had when *oyer* demanded. Barnes, 238.

That is, as much time in term-time, as many pleading days to plead, and no more, after *oyer* granted, as he had when it was demanded. 3 T. R. 356.

The same time is allowed for pleading, after delivery of a particular, as remained when the summons for it was returnable. 13 East, 508.

Sunday is included in matters *in pais*, as notice of trial; but not in matters in court, as in pleading. *Prosser v. Winston*, T. 1722. Bunb. 113.

Sundays are counted, unless they are the first or the last day: if the rule is given on Sunday, it is void; if it expires on Sunday, defendant has all next day to plead. Anon. E. 4 G. Str. 86.

The time of a plea, pleaded, is to be reckoned from the date of the entry of the plea on the record; not from the time of its being delivered to the plaintiff. Dougl. 109.

And a plea in bar, filed before bail excepted to, are perfected, is a nullity, and therefore not made good by perfecting bail afterwards. 4 T. R. 578. 2 East, 406.

If a declaration be delivered to a defendant in prison upon the st. 4 & 5 W. & M. 21. before *mens. pasch.* or *crast. animar.* in London or Middlesex, or forty miles distance, he must plead two days before the essoign-day of the next term. Vide ante, (B 5.—C 4.)

[\*]If farther distant, he may imparl to the next term. Vide ante, (D 2.)

In country causes, defendant living above twenty miles from London has eight days to plead. Barnes, 244.

In a country cause, though the defendant reside within twenty miles of London, he is entitled to eight days' notice to plead, whether he has himself appeared, or an appearance has been entered for him. 1 M. & S. 566.

With reference to the time allowed for pleading, the place where the defendant is arrested is the place of his residence. 4 T. R. 553.

If the defendant appears upon a *habeas corpus* returnable immediately, in Hilary or Trinity term, and the declaration be delivered eight days before the end of the term, the defendant shall plead the same term, so that it may be entered. Pr. Reg. 70. 406.

If in Easter or Michaelmas, and term, the declaration be delivered before *mens. pasch.* or *cras. animar.*, the defendant shall plead the same term, so that it may be tried. Pr. Reg. 70. Sal. 515.

Defendant shall not now be obliged to plead sooner upon a special *capias* by original, than upon a *latitat*; though formerly it was otherwise. *Haywys v. Savage*, H. 12 G. Str. 684.

If a declaration be so delivered on a *cepi corpus*, he shall only plead to enter. Sal. 515.

If the defendant be an officer of the court, he must plead within eight days after the bill filed, and rule given. Sal. 517.



If declaration is delivered without notice to plead, and afterwards notice in writing is given to defendant (living above forty miles from London) to plead in eight days, it is good. Anon. H. 2 Geo. 3. 2 Wils. 137.

And the rule may be given the day of the filing of the bill. Sal. 517.

And Sundays, &c. are counted. Sal. 517.

Notwithstanding the day on which a rule to plead expires, is *dies non juridicus*, the defendant has not the day following to plead in. 2 H. B. 616.

And, if there are not eight days within the term, he must plead in four. Sal. 517.

A defendant has twenty-four hours clear to plead after demand of a plea. 4 T. R. 118.; exclusive of an intervening Sunday. 4 T. R. 557.

If defendant is abroad, and his attorney dead, on notice to bail, court will order that demand of plea in the office shall be sufficient. Barnes, 307.

On an information, if the defendant be brought up by a *capias*, he must plead *instantly*. R. 3 Mod. 215. Vide Information, (D 5.)

So, if he comes in person, or by recognizance, or is a prisoner. D. 3 Mod. 215.

By the st. 13 Car. 2. 2. a prisoner brought up by *habeas corpus* and served with a declaration at the bar; and now by the st. 4 & 5 W. & M. 21. and 8 & 9 W. 3. 27., a prisoner served with a declaration in gaol, shall appear and plead; or otherwise, on rule given to be out in eight days, at least, after delivery of the declaration and affidavit of such delivery, plaintiff may sign judgment. Vide ante, (C 4.)

If declaration is delivered to a prisoner last day but one of term, he must plead two days before the essein of next term. Barnes, 224.

A plea filed by a prisoner, is only well filed from the time of notice given. 4 T. R. 664.

A plea filed by a prisoner as of a term antecedent to that in which he is [\*]bound to plead, is a nullity, unless he gives notice to the plaintiff. 8 T. R. 596.

The rule, that a defendant must give notice of having filed a plea, only applies, where he pleads out of; that is, before regular time for pleading. 5 T. R. 473.

Rule shall not be given, till affidavit filed with the secondary of the time when, and to whom, the delivery was.

And judgment shall not be signed before a copy of an affidavit be produced to the prothonotary, and a certificate that there is no appearance entered.

The court will grant time to plead, if defendant is so ill of a palsy as not to be able to speak or write, on condition that he do nothing to prejudice plaintiff; but if it continues long, there must be a commission out of chancery to take him into custody. Jasper v. Grosvenor, T. 7 G. 2. B. R. H. 52.

On affidavit that defendant does not know plaintiff, and cannot find his attorney, whose name is not on the roll of attorneys, the court will stay proceedings till notice where plaintiff lives; and fixing the rule in the office, good service. Evans v. Jones, M. 9 Geo. 2. B. R. H. 179.

Where the time to plead is granted, the computation is, inclusive of the day on which the order is dated; exclusive of that on which it expires. 2 H. B. 35.

As well under an order for further time to plead, as under a rule to plead, the first and last days are reckoned, both inclusive. 1 B. & P. 479.

The condition of pleading issuably, and taking short notice of trial for the next sittings, obliges the defendant so to plead, that, as far as depends upon him, the cause may come to trial at those sittings; therefore, if the declaration is delivered after the sittings have begun, he must plead *instantly*, provided, that by so doing, the plaintiff is in time to give notice of trial for the adjournment day. 1 Taunt. 343.

If after four-day rule is expired, defendant obtains judge's order to plead issua-  
[\*141]



bly two days before essoin of next term; and before that pleads tender, and entitles it as of preceding term, it is regular; for it is not after an imparlance, and tender is issuable within the meaning. *Kilwick v. Maidman*, H. 30 Geo. 2. 1 B. M. 59.

General performance of covenants, not signed by counsel, is not an issuable plea. *Barnes*, 354.

Demurrer is not an issuable rejoinder within an order for time. *Barnes*, 168.

A judge at his chambers, in vacation time, may make an order that defendant shall plead such plea as he will stand by. *Foster v. Snow*, P. 32 Geo. 2. 2 B. M. 781.

After the defendant has been ruled to abide by his plea, or plead such a plea as he would abide by, he cannot plead another special plea, but only the general issue, under which he may give notice of set-off. 1 T. R. 693.

After a rule to abide by a plea, the defendant cannot withdraw a demurrer, and plead *non est factum*, and also two special pleas to several branches in covenant, although the latter pleas only tend to put the facts in issue. 3 Smith, 179.

In a debt on bond, the defendant on *oyer* set it out truly, and pleaded payment, upon which issue was taken: the defendant ruled to abide by his plea, and notice of trial given. The defendant returned the paper book, setting out a false *oyer*, and pleading as before: plaintiff enrolled the true condition, and demurred. The court, on an affidavit of the facts, though on the last paper-day in the term, granted a rule nisi for striking out all the proceedings, gave the plaintiff judgment, and made the defendant's attorney pay all the costs, threatening moreover to attach him. 4 T. R. 371.

[\*] A plea of *solvit ad diem*, concluding with a verification, cannot be entered in the general issue book. 5 T. R. 661.

Where the defendant pleads a sham plea, the court will not allow him to withdraw it, and plead the general issue. 2 Wils. 369.

The court cannot stay proceedings in debt on bond, because it was agreed not to be made use of but on certain contingencies. *Dolliffe v. Langley*, P. 9 Geo. 2. B. R. H. 240.

### (E 42.) Judgment for default of a plea:—A rejoinder.

When there shall be judgment on default or confession. Vide sup. (E 41.) Post, (Y 1, 2.)

If plaintiff enters appearance, judgment may be signed, without calling for plea. *Jones v. Wilkinson*, C. P. E. T. Geo. 2. *Barnes*, 249. *Palk v. Rendle*, B. R. H. 40 Geo. 3. 8 T. R. 465. *North v. Lambert*, C. P. T. 40 Geo. 3. 2 Bos. & Pull. 218.

No demand of a plea is necessary, when the defendant is in the custody of a sheriff. *Wilkinson v. Brown*, B. R. H. 36 Geo. 3. 6 T. R. 524.

Neither is it necessary in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant, without notice to the plaintiff, removes himself to a different custody. Ibid.

In C. B. no demand of a plea is necessary, where the plaintiff enters an appearance for the defendant, pursuant to the statute. 2 B. & P. *Secus*, in K. B. 8 T. R. 465.

After obtaining a judge's order for time to plead, the demand of a plea is unnecessary. 4 East, 571.

After plea in abatement (or semble any plea) irregularly filed, and which the plaintiff treats as a nullity, the demand of a plea is not necessary previous to signing judgment as for want of one. 2 Smith, 393.

Where an order has been obtained for further time to plead, the demand of a plea is unnecessary. 1 Taunt. 538.

A demand of a plea may be made at the time of delivering the declaration. *Edmonton v. Osborne*, B. R. E. 36 G. 3. 6 T. R. 689.

A plea cannot be demanded where a defendant is not in court ; that is, before he has appeared or the plaintiff has filed common bail for him. 1 T. R. 635.

A demand of a plea may be made before a rule to plead is given. 2 Smith, 159, 5 East, 547.

But held in C. B. that the demand of a plea, made before a rule to plead given, is a nullity. 4 Taunt. 51.

In the K. B., if a prisoner is in custody of the marshall, there must be a demand of a plea ; *secus*, where he is in custody of the sheriff. In the former case he is in court ; in the latter, not. 1 T. R. 591.

A prisoner who is prevented justifying bail, by the plaintiff's desire to inquire into their sufficiency, is, from the time of his notice of justification, entitled to the demand of a plea. 2 B. & P. 367.

Plaintiff cannot sign judgment for want of a plea, without demanding one ; though defendant has not taken the declaration out of the office. *White v. Dent*, C. P. M. 39 G. 3. 1 Bos. & Pull. 341.

A plaintiff entitled to judgment for want of a rejoinder, may strike out the pleadings subsequent to the declaration, and sign judgment as for want of a plea. 5 T. R. 152.

Judgment may be signed for want of a plea, at any time after twenty-four hours from the time of the plea demanded. 1 T. R. 454.

Interlocutory judgment may be signed on the last day of the time given by the rule to plead, if no plea be then filed. 2 Price, 6.

If defendant's attorney has undertaken to appear, judgment may be signed though appearance is not actually entered. *Barnes*, 238.

[\*]If declaration is left in the office before appearance or notice, then appearance, and then notice in another term, and judgment signed next term, it is good ; for the declaration is only well delivered from the notice. *Barnes*, 242.

If the defendant appears and pleads nothing, his attorney may suffer judgment on *non sum informatus*. Vide post, (Y 1.)

If a matter which ought to be pleaded in abatement is pleaded in bar, judgment shall be for plaintiff ; as, if defendant, who is sued alone, pleads that it is upon a joint bond. *Watts v. Goodman*, H. 13 G. Ld. Raym. 1460.

Summons after rule to plead is out, is no stay, and judgment may be signed. *Barnes*, 241. 252. 254. 273.

If summons for time is served before judgment can be regularly signed, it shall be set aside on terms. *Barnes*, 265.

If defendant has time, on terms of pleading issuably, and puts in a sham demurrer, judgment may be signed ; but not if it is a fair demurrer. *Gray v. Ashton*, M. 6 G. 3. 3 B. M. 1788.

The defendant cannot put in a special demurrer when he is under terms of pleading issuably. *Berry v. Anderson*, B. R. H. 38 G. 3. 7 T. R. 30.

If defendant, when under an order to plead issuably, puts in a plea, which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a plea. *Thellusson v. Smith*, B. R. H. 33 G. 3. 5 T. R. 152.

A. having privilege of parliament, owes B. a sum of money, for which B. sues him ; in consequence of which C. enters into a bond, together with A., conditioned for the payment to B. of such sum as B. shall recover in the action against A., in pursuance of the stat. 4 G. 3. c. 33. In that action B. obtains judgment, and puts the bond in suit against C. To the action on the bond, C. being under terms by a judge's order to plead issuably, may plead in bar, that a writ of error is depending on the judgment against A. *Curling v. Innes*, C. P. M. 35 G. 3. 2 H. Bl. 372.

Or, if he is to rejoin gratis, &c. and instead thereof demurs. *Barnes*, 371. 168.

If defendant, under order to plead issuably, pleads in abatement, plaintiff may sign judgment without applying to the court. *Barnes*, 263.

Judgment may be signed without a new rule, after order for time to plead. *Barnes*, 243.

[\*143]

After rule given to plead, plaintiff being staid by injunction, may sign judgment without a new rule. Barnes, 238.

Judgment shall not be set aside for irregularity in the appearance entered by plaintiff, if defendant had notice of the declaration left in the office, for he should have applied sooner. Barnes, 242.

If *non. pros.* is signed irregularly, plaintiff may proceed to judgment. Barnes, 251.

If the defendant appears, but does not plead according to the course of the court, there shall be judgment against him by *nihil dicit*.

If defendant dies pending argument, judgment shall be signed *nunc pro tunc*, even though plaintiff had delayed himself by joining issue on an immaterial plea. Barnes, 255.

Judgment signed after defendant's death, is good by relation, if roll filed before essoin day of next term. Ibid. 266, 267, 268. 270.

But there shall be no judgment against him till a rule to plead, given in the prothonotary's office, where the cause is entered, and expired. C. Att. 295. Mod. Co. 22.

If several defendants, and one has no notice of writ or declaration, judgment must be set aside. Barnes, 246. 293.

[\*] Notice of declaration must be dated, and contain the nature of the action. Barnes, 291. 295. 299. 409.

If the nature of the action is not expressed in notice of declaration, judgment shall be set aside. Ibid. 493.

Notice of declaration left under the door of the house where defendant had been served, but now empty, good ; but put under the latch without knocking, bad. Ibid. 278. 403. 411.

If notice is not given till after two terms from return of the writ, (though declaration was in time,) it is irregular. Ibid. 291.

If defendant's attorney cannot be found, notice to the party is sufficient. Ibid. 307.

In bailable action, notice of declaration *de bene esse* is not necessary. Ibid. 301.

If judgment is entered for want of plea in four days, and there has been no notice of declaration, though special bail put in, accepted to, and justified, and afterwards plea of coverture, judgment shall be set aside. *Simmonds v. Shannon*, M. 11 G. 3. 3 Wils. 147.

Judgment was signed on the 2d of November, plaintiff filed common bail on the 3d, and a rule was given to show cause why the judgment should not be set aside for irregularity. The rule was, however, discharged, upon its being stated by the master to be the constant practice to sign judgments on the 2d of November, before the essoin-day, in all cases where common bail is filed between the 2d and 6th of November. *Wansey v. More*, B. R. M. 33 G. 3. 5 T. R. 65.

Notice to plead in four days, instead of eight, is bad ; though plaintiff stays eight. Barnes, 302.

Notice to plead within the first four days of term, good ; and the days inclusive. Ibid. 303.

If rule to plead before notice of declaration, judgment bad. Ibid. 218.

Demand of a plea on declaration, not sufficient ; it must be in writing after rule given. Ibid. 276.

In B. R. judgment may be signed for want of a plea, at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne*, B. R. M. 27 G. 3. 1 T. R. 454.

And this is the rule, whether the time for pleading be or be not expired when such demand is made. *Bowles v. Edwards*, B. R. M. 31 G. 3. 4 T. R. 118.

If a plea be demanded on a Saturday, the defendant has twenty-four hours to plead, after the demand, exclusive of Sunday. *Solomons v. Freeman*, B. R. H. 32 G. 3. 4 T. R. 557.

And a demand of plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. 1 T. R. 635.

Declaration left before appearance, must be marked *de bene esse*, or judgment bad. Barnes, 257. 310.

Where the declaration, filed in the office before defendant's appearance, was indorsed, filed conditionally, and judgment afterwards signed for want of a plea; the court held it regular, though the notice, served on the defendant, was of a declaration generally. Cort v. Jacques, B. R. M. 39 G. 3. 8 T. R. 77.

Writ returnable in Easter, judgment signed, and set aside for defective notice in Trinity; proper notice in Michaelmas, judgment shall be set aside; for the declaration (i. e. the notice) is too late. Barnes, 291.

In real and mixt actions, common rule to plead is not sufficient; there must be a peremptory. Ibid. 260.

And such rule does not expire till four days inclusive are past, and it shall not be given after three days from the end of any term. C. Att. 295.

[\*] If process is returnable 15th November, declaration with notice to plead in eight days, left in the office 24th November, and defendant does not plead nor file common bail, and plaintiff files common bail, and signs judgment six weeks after, it is well. He might have signed it immediately after the eight days. Shadwell v. Angel, M. 30 G. 2 B. M. 55.

Notice to plead need not be given within the same time that a declaration must be filed. 3 Burr. 1452.

The delivery of a declaration, indorsed "delivered conditionally," is not equivalent to a notice to plead. 2 N. R. 223.

A rule to plead is not dispensed with by taking out a summons for further time, and neglecting to attend. 3 B. & P. 180.

Where the indorsement to plead is left blank at the same time, it must be taken to mean the time allowed. Ibid. 363.

If a defendant obtain time to plead in Easter term, under a judge's order, which does not extend to the first day of the following term, the plaintiff may enter up judgment as of such following term, without having a new rule to plead. 1 Moore, 320.

No proceedings having been had for above a year, the plaintiff, two days before Hilary term, gave notice of his intention to proceed. Two days after the term, he served a rule to plead, and the same vacation judgment was signed for want of a plea, which was held to be regular. Milbourne v. Nixon, B. R. T. 27 G. 3. 2 T. R. 40.

Plea, though with notice of set-off, cannot be delivered in the country. Barnes, 251.

Plaintiff may sign judgment for want of plea, if tender pleaded, and money not brought in, though defendant has signed *non pros.* for want of replication. Ibid. 252.

If defendant do not rejoin, the plaintiff may strike out the previous pleadings, and enter judgment as for want of a plea. Petrie v. Fitzroy, B. R. H. 33 G. 3. 5 T. R. 152.

If *nil debet* pleaded to a promissory note, judgment may be signed. Barnes, 257.

So, if plea by attorney of another court. Ibid. 259.

Or, plea in abatement after rule out. Ibid. 331. Brandon v. Payne, B. R. E. 27 G. 3. 1 T. R. 689.

Though no rule to plead had been regularly served. Ibid.

To an action of debt on bond, the defendant pleaded *solvit ad dicm*, and entered it in the general issue book; the plaintiff was thereby enabled to sign judgment as for want of a plea, it being considered as a waiver of the imparlance to which the defendant was entitled. Lockhart v. Mackreth, B. R. T. 34 G. 3. 5 T. R. 661.

[\*145]

Or, if plea is not delivered in form, though a note on stamp (I plead *nil debet*) was sent. Barnes, 239.

So, if the defendant pleads the general issue, but his attorney refuses payment for the issue delivered. 1 Sal. 5.

The plaintiff does not waive his right of signing judgment for not paying the issue money, by giving notice of trial after demanding it. Jones v. Bryant, B. R. M. 34 Geo. 3. 5 T. R. 400.

A plaintiff pauper is not entitled to the issue money; and if he sign judgment because the defendant does not pay it, the court will set aside the judgment. Codron v. Hayman, B. R. H. 34 Geo. 3. 5 T. R. 509. Vide infra, (M 4.)

If declaration is left in the office *de bene esse*, and notice given, defendant must take it out and pay for it; or plaintiff may refuse plea, and sign judgment. Keeling v. Newton, T. 21 G. 2. 1 Wils. 173.

Judgment may be signed for nonpayment of copy of which *oyer* is prayed. Barnes, 238.

[\*]So, if the defendant pleads a plea merely void or frivolous. Semb. 1 Sand. 318.

Or, pleads a matter which would not amount to a justification, if it had been well pleaded. Mod. Ca. 10. R. 1 Sal. 173.

So, if the defendant justifies in trespass by a void warrant, and traverses the taking in the place alleged; after a verdict for the plaintiff, there shall be judgment for him upon the confession, and a writ of inquiry shall issue; for it cannot be on the verdict, where the issue was immaterial. R. 1 Sal. 173.

But where the defendant pleads a defective plea, there shall be judgment against him upon the plea, and not upon *nihil dicit*; as, if A. pleads to debt upon a bond payment at such a day, (which was after the day limited by the bond,) though he confesses no payment within the time, yet the judgment shall be on the plea, for it is not an express confession. R. Cro. El. 823.

So, if A. pleads that B. *dicit*, &c.; yet being entered as a plea, though it was but as a tale of B.'s, the judgment shall be on the plea, and not on *nihil dicit*. R. Yel. 38.

So, if the defendant pleads a thing which would have been a good justification. Mod. Ca. 10. R. 1 Sal. 173.

If the plaintiff, when the declaration is delivered, underwrites that the defendant shall not be required to plead, till a deed, will, or letters of administration shown, there shall not be judgment for want of a plea, till they are shown. C. Att. 296.

If agent gives time, the country attorney cannot sign judgment till it is out. Barnes, 256.

So, the defendant need not plead till *oyer* of the condition, deed, &c. and a copy thereof delivered. P. Reg. 417.

Judgment shall be set aside, if perfect *oyer* has not been given. Barnes, 363.

If defendant having had time to plead, pleading an issuable plea, pleads a bad plea, (as *nil debet*, to case on a promissory note,) it is not a breach of the order, for it will be good after verdict, or plaintiff may have judgment on demurrer. Baily v. Edwards, M. 9 G. 2. B. R. H. 179.

Judgment cannot be signed till summons to show cause why time, &c. is discharged, though defendant's attorney did not attend. Barnes, 240. 255.

On order for two days' time, judgment cannot be signed till the third day in the afternoon. Barnes, 266.

Time to plead under a judge's order is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires. Kay v. Whitehead, C. P. E. 32 Geo. 3. 2 H. Bl. 35.



Though a rule to plead expire on a *dies non juridicus*, et. gr. the purification, the defendant is bound to plead on or before that day; and if he do not, judgment may be signed against him on the next day. *Mesure v. Britten*, C. P. H. 36 Geo. 3. 2 H. Bl. 616.

On a rule to plead by a particular day, that day is construed to continue till the office open next morning. *Oxley v. Bridge*, B. R. H. 19 Geo. 3. Dougl. 67.

On a rule to plead, &c. in four days, if the defendant delay till the morning of the fifth day, the plaintiff may sign judgment. *Haselar v. Ansell*, B. R. T. 19 Geo. 3. Dougl. 197.

On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the fifth day, the [\*]adverse party may refuse to receive it, and sign judgment. *Thompson v. Ryall*, B. R. H. 31 Geo. 3. 4 T. R. 195.

If time to plead be granted to a defendant, who is then dead, (unknown to attornies,) and at the expiration of the time judgment is signed, it shall be set aside. *Sibbet v. Russel*, M. 9 G. 2. B. R. H. 183.

If defendant dies after the rule to plead is out, but before time given by judge's order is expired, the suit abates; and interlocutory judgment, and all proceedings thereon, shall be set aside as irregular. *Wallup v. Irwin*, H. 25 G. 2. 1 Wils. 315.

Where bail is filed, plea must be demanded in writing, though notice to plead be on the back of the declaration, otherwise judgment will be set aside with costs. *Nott v. Oldfield*, T. 19 & 20 G. 2. 1 Wils. 134.

If defendant has time to plead on the usual terms of pleading an issuable plea &c. and pleads 23 H. 6. c. 10. (against sheriff's taking bonds *colore officii*, &c.,) and that this bond was taken for ease and favour, &c.: it is within the order; and judgment signed for want, &c. shall be set aside with costs. *Dearden v. Holden*, R. 31 G. 2. 1 B. M. 605.

Judgment because defendant pleads in abatement, without taking out the declaration, is irregular. *Barnes*, 250.

Judgment cannot be signed for want of new plea after declaration amended; defendant need not plead *de novo*. *Barnes*, 273.

The rule to plead to an amended declaration is a four-day rule. *Barton v. Moore*, B. R. M. 39 Geo. 3. 8 T. R. 87.

Judgment on a declaration, entitled of a wrong term, is void. *Barnes*, 274.

If outlawry is pleaded in bar, and not as a dilatory, judgment signed because it is not *sub pede sigilli*, shall be set aside. *Barnes*, 241.

So, judgment shall not be entered, if a plea be delivered at any time after the rule expired. *Pr. Reg.* 406.

If a party neglect to plead, reply, &c. within the time limited by the rule, the other may sign judgment, though a plea, replication, &c. be tendered before judgment signed. 4 T. R. 195.

So, if an action has depended four terms without prosecution, there shall not be judgment without a term's notice given to plead. *P. Reg.* 411.

So, after judgment, if the plaintiff's attorney consents to waive it, he shall be bound so to do, though his client refuses. 1 Sal. 186.

Judgment signed by mistake may be waived, and new rule and judgment, without leave. *Barnes*, 251.

So, if judgment be signed for want of a plea, and the defendant offers an issuable or fair plea without delay, it shall be discharged on payment of costs. Sal. 518.

The court will set aside a regular judgment on affidavit of merits, though bankruptcy is intended to be pleaded. *Evans v. Gill*, C. P. T. 37 Geo. 3. 1 Bos. & Pul. Rep. 52.

The court will not set aside a judgment, so as to allow the defendant to plead the statute of limitations. *Willett v. Atterton*, B. R. T. 22 Geo. 2. 1 B. L. 35.

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Judgments are frequently set aside on costs, pleading issuably, and taking short notice. Barnes, 242, 243. 250. 253. 256. 260. 271. 303.

Motion to set judgment aside ten days after signing, too late. Barnes, 247.

If judgment is signed because coverture is improperly pleaded, it shall be set aside. Ibid. 246.

If several pleas, and issue joined on some, judgment by default cannot be entered in the other till those are tried. Barnes, 269.

[\*]Judgment cannot be signed against casual ejector for want of plea in form, if tenants have appeared, entered into common rule, and sent note of — not guilty, unless new declaration against tenants had been delivered. Barnes, 270.

There must be the same notice and time to plead on declaration after exigent superseded, as after any other process. Barnes, 271.

On issue joined on *nul tiel* record, rule for judgment, if final, must be, unless cause in four days; if interlocutory, four days not necessary. In proceedings by original, a general return-day is given to bring in record, and defendant is called at rising of court; if he fails, rule unless cause on the appearance day, and record may then be brought in; but by bill against attorney, the day given is a day certain, and record cannot be brought in after, and at rising of court they will appoint the day for judgment *nisi*. Barnes, 265.

Motion to stay proceedings for irregularity in process, or notice of it, must be before judgment. Barnes, 269. 296.

And for irregularity in notice of declaration, two days before inquiry is to be executed. Barnes, 255.

Copies of process must be annexed to the affidavits to stay proceedings. Barnes, 298.

If defendant, after having craved oyer of a deed, do not set forth the whole deed, plaintiff may sign judgment as for want of a plea. Wallace v. Cumberland, B. R. T. 31 Geo. 3. 4 T. R. 370.

Where a declaration consists of two counts, to one of which there is a judgment by default, if the plaintiff at the trial of the issue on the other, can only prove one cause of action, and to which the former count is adapted, the defendant is entitled to a verdict. 7 T. R. 727.

It seems, that after a judgment against the defendant on demurrer or by default, he is still considered as in court for all purposes necessary to attain substantial justice. 2 H. B. 350.

## (F) REPLICATION.

### (F 1.) To whom it shall be delivered.

A replication is the plaintiff's reply to the defendant's plea, and ought to be delivered to the defendant's attorney. C. Att. 40, 41.

### (F 2.) In what manner.

If the replication be special by traverse or otherwise, it must be under a serjeant's or counsel's hand. C. Att. 40.

Replication of *nul tiel* record. must (in C. B.) be signed by a serjeant, R. (all pleas except general issues D.) especially if the plea was signed by a serjeant. Simpson v. Neale, T. 30 & 31 G. 2. 2 Wils. 74. Barnes, 365.

### (F 3.) At what time.

If the defendant pleads, the plaintiff must reply in the next term.

And if he does not on the day given, he will be nonsuited. Latch. 129.

But he cannot be compelled to reply the same term, in which the defendant pleads. Ibid.

The defendant cannot, within the further period allowed to plead, rule the plaintiff to reply without giving notice of his plea. 1 N. R. 273.

[\*](F 4. ) The form of a replication.

The replication ought to answer the whole plea, otherwise it is a discontinuance. 1 Sand. 338. Vide ante, (E 1.)

If the plea admits a nonperformance by offering an excuse, it is sufficient if the replication meets the plea, and falsifies the excuse, in all cases, (except only an award.) Att. Gen. v. Elliston, T. 5 G. in Sc. Str. 191.

The replication ought to ascertain the matter to which it replies; as, *assumpsit* on several promises, the defendant pleads non-age, the plaintiff replies, that part of the goods were for necessary food, part for clothes; it is bad, if he does show what part was for the one or the other. R. Lut. 241. [Vide 1 T. R. 40.]

To plea of *plene administravit* except 10*l.* replication praying judgment for the 10*l.* damages, and "further, that on the day of suing original defendant had goods of testator to the value of the residue of the debt, over and above the 10*l.*" is good. Lockyer v. Coward, P. 10 G. 3. 3 Wils. 52.

But if there are several pleas, and the plaintiff replies *quoad separalia placita prædicta*, it is good, though he does not make a several replication to every plea in particular. R. 1 Sid. 39.

And, if the plaintiff by replication shows several matters, and begins his replication *præcludi non quia quoad, &c. dicit*, and makes a general conclusion to the whole; yet they are several replications as well as if he had said *quoad &c. præcludi non* to every matter. R. 1 Sand. 337. But Sanders semb. cont.

In *formedon*, if the defendant pleads several fines, the demandant may say that the several fines were without proclamations, and need not reply to every bar particularly. R. Dy. 182. a.

And if there are several replications, or pleas, and the rejoinder or replication says *quod placitum prædictum*, in the singular number, yet it is good; for it is *nomen collectivum*. R. cont. Yel. 65. R. acc. 1 Sand. 338. But Sanders semb. cont.

So, if there are several pleas, and the plaintiff makes one replication to all, it is good; as, *de son tort* to the several pleas. R. 1 Leo. 124.

Yet, a demurrer *quoad separalia prædicta*. A. and B. who plead severally, is bad; for he ought to demur severally. R. 1 Leo. 139.

In debt on bond to perform articles, the plaintiff cannot reply new matter in the deed, but must set it out upon *oyer*. Stibbs v. Clough, M. 6 G. Str. 227.

If defendant pleads that the ditches, ways, and passages, were so filled with water that he could not carry off his tithes, and plaintiff replies, that the ditches, ways, and passages, were not so filled, it is good, though in the conjunctive. South v. Jones, M. 6 G. Str. 245.

{ So, where the plaintiff replies to immaterial facts, and repeats the averments of performance, contained in the declaration, the replication is bad. Rogers v. Burk, 10 Johns. Rep. 400.

But where to a declaration containing several distinct causes of action, the defendant pleaded the statute of limitations; replication, that the promise laid in the first count, is within an exception of the statute, was held to be good. Perkins v. Burbank, 2 Mass. Rep. 81. }

It is good if it alleges plaintiff should not be barred from having his action aforesaid, though it doth not say, in this court. Gardiner v. Jessop, H. 30 G. 2. 2 Wils. 42.

(F 5.) How it shall conclude.

So a replication shall conclude with praying debt and damages. R. Cro. El. 256. Adm. 1 Sand. 98.

And therefore a replication, concluding *unde petit judicium*, if the plaintiff *ab actione præcludi debet*, seems bad on a special demurrer. Ray. 182.

[\*] Yet, where the plaintiff prays judgment and his debt, it is sufficient, and damages shall be given as incident. R. 1 Lev. 222.

So, in debt, if the plaintiff prays judgment and damages, omitting the debt, it will be good; for when the court gives judgment, it shall be for the whole. R. upon a special demurrer. 2 Lev. 19.

But a bad conclusion, generally, is only form. D. Hob. 321.

And therefore not praying damages shall be aided on a general demurrer. R. 1 Sand. 98.

If replication begins wrong, and concludes right, it is good; for the conclusion makes the plea. Talbot v. Hopwood, P. 5 G. 2. C. B. Fort. 335.

Wherever a traverse is added, there must be an averment. Baynham v. Matthews, T. 4 G. 2. Str. 871.

Unless it deny the whole substance of the plea, and then it must conclude to the country. Doug. 95. n.

In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence of such agreement, the plaintiff may traverse the corrupt agreement and conclude with a verification. Smith v. Dovers, B. R. T. 20 G. 3. Dougl. 428. < Vide Waterman v. Haskins, 7 Johns. Rep. 283. >

When the whole of the matter of the plea is denied in the replication, it must conclude to the country; but when a particular fact alleged in the plea is selected and denied, then the replication must conclude with an averment. By Buller J. Ibid.

If defendant plead to debt on bond that plaintiff won money of him at cards, and that the bond was given for securing payment of it; to which the plaintiff replies, that it was given for the securing the payment of money justly due, and not for securing the payment of money won, the replication may conclude either to the country or with an averment. Hodges v. Sandon, B. R. E. 28 Geo. 3. 2 T. R. 439. Vide Baynham v. Matthews, B. R. T. 4 Geo. 2. 2 Str. 871. Robinson v. Rayley, B. R. E. 30 Geo. 2. 2 Bur. 317. Sandford v. Rogers, C. P. H. 33 Geo. 2. 2 Wills. 113.

< Where to an action of trespass, the defendant justifies under the authority of a statute, the plaintiff must reply *de injuria*, and conclude to the country; a special replication concluding with an averment is bad. Comly v. Lockwood, 15 Johns. Rep. 188.

So, a replication of *nul tiel record* to a plea of former judgment, must conclude to the country. Baldwin v. Hale, 17 Johns. Rep. 272.

So, where the plaintiff, in his replication, confesses and avoids the material facts alleged in the plea, he may not add a traverse, and thereby, prevent the defendant from denying the facts, which avoid his defence. Oystead v. Shed, 13 Mass. Rep. 520. >

(F 6.) Must be conformable to the count.

So, a rejoinder to the bar. Vide post, (H).

The replication ought to be conformable to the count: and therefore in trespass for a wrongful taking and detaining in prison, if the defendant justifies by process, &c. and the plaintiff replies that a *supersedeas* afterwards issued, after which he detained him, it will be bad; for by his replication he does not maintain the wrongful taking, but only the detention. R. Cro. El. 404.

In trespass, if the defendant pleads his freehold, and the plaintiff replies *de son tort* the defendant committed the trespass, but omits the carrying away of the posts in the declaration, it is bad. R. Lut. 1402.

Debt for 80*l.* on bond, the defendant pleads that it was given for money won at play; replication that it was not for money won at play, is bad; for he ought to say no part of the money was won at play. R. 2 Mod. Ca. 57, 58.

In false imprisonment on 12 G. if defendant pleads process of an inferior court, and plaintiff replies the debt was 5*l.* and no affidavit made of the debt, it is bad; for the case of an affidavit in an inferior court is dropt in the act. Rycraft v. Calcraft, Fort. 344.

**[\*](F 7.) Departure, what shall be:—If the replication, &c. does not maintain the declaration, &c.**

So, if a replication departs from the declaration, or a rejoinder from the plea, it is bad. Co. Lit. 303. b. { Vide Munro v. Allaire, 2 Caines' Rep. 320. Barlow v. Todd, 3 Johns. Rep. 367. Sterns v. Patterson, 14 Johns. Rep. 132. }

Departure is, when a replication contains subsequent matter, which does not maintain or fortify the matter in the declaration. Co. Lit. 304. a.

As, if the defendant in trespass entitles himself by descent, the plaintiff replies a feoffment by the defendant himself; if the defendant rejoins that the feoffment was upon condition, and he entered for the condition broken, this is a departure. Pl. Com. 7. b. Co. Lit. 304. a.

So, if the defendant in covenant pleads performance, generally, and the plaintiff assigns a breach in the not doing of such an act, and the defendant rejoins that he offered to do it, this is a departure; for offer and refusal is not the same as a performance. Co. Lit. 304. a. Cro. Car. 76, 77.

So, if a feoffment by A. be pleaded, and the plaintiff replies that A. dis-seised him, and then enfeoffed, and he re-entered, and the defendant rejoins that after the feoffment the plaintiff released, this is a departure; for it is matter subsequent. Pl. Com. 105. b.

So, in trespass, if the defendant justifies the distraining a hide for a customary payment, and the plaintiff replies that he tanned the hide after the distress, and the defendant rejoins that it was to prevent its rotting, it is a departure. R. Cro. El. 783.

So, in trespass, if the defendant justifies by a warrant, and the plaintiff replies that after the warrant, (*viz.*) such a day, he did the trespass, and so varies from the time in the declaration, it is a departure. R. Cro. Car. 228. per two J. Cro. Car. 246. 334. Vide post, (F 11.)

So, if he justifies by a deed dated 1st May, and in the rejoinder says it was *primo deliberat.* 9 Maii. R. 3 Lev. 349.

Or, varies in the date of a bond. 1 Sal. 222.

If defendant pleads that the ship went from London to B. without deviation, and from B. to London, but was lost in *viaggio prædicto*; if the plaintiff shows a deviation to Jamaica, and the defendant says that she was impressed to Jamaica, it will be a departure. R. Skin. 345.

So, in debt on a bond to perform an award, if the defendant pleads no such award, and the plaintiff shows the award and assigns a breach, and the defendant rejoins that the award is bad; this is a departure. R. Ray. 94. 1 Sid. 180. R. 2 Rol. 692. l. 40.

So, if the defendant rejoins, that the award was not delivered, &c. R. 2 Sand. 184. 1 Lev. 300.

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Or, not made of all controversies. 1 Lev. 127. [R. on demurrer. *Harding v. Holmes*, H. 19 G. 2. 1 Wils. 122.]

So, on a bond to indemnify, if the defendant pleads *non damnificatus*, and the plaintiffs, by replication, show that they are damaged by maintaining his bastard; rejoinder, that he offered to maintain, is a departure. R. 2 Sand. 84. Vide 1 Sand. 117.

So, on a bond to perform covenants, which was to make a fence when he cut down the wood, the defendant pleads that he did not cut down any wood, and the plaintiff replies that he cut two acres and did [\*]not make a fence, and the defendant rejoins that he made a fence; this is a departure. R. Dy. 253. b.

If a bond be to pay all charges to an attorney for such a suit, and the defendant pleads payment, and the plaintiff shows such a sum not paid, and the defendant rejoins that he had no bill of it; this is a departure. R. Lut. 422.

Or, if the defendant rejoins that the plaintiff did not name a place for the payment of it. R. 2 Mod. 31.

Debt on bond, with condition to execute the office of overseer singly without plaintiff's assistance; defendant pleads, that he did execute singly without plaintiff's assistance; plaintiff replies, that he did not execute singly without plaintiff's assistance; defendant rejoins, that plaintiff voluntarily took on him the office without defendant's request, and that he did it without his request; it is a departure. *White v. Clever*, M. 13 G. Fort. 333. Lord Raymond, 1449.

If a bond be to perform covenants, and the defendant pleads performance, and a breach being assigned for nonpayment of rent, rejoins that he was expelled. R. Ray. 22. 1 Sid. 77.

Or, if he rejoins, that he has paid so much rent, and so much for taxes, which makes up the whole demand for rent. R. 1 Sal. 221.

So, in replevin, if the defendant avows for damage feasant in his freehold, and the plaintiff pleads that he leased to B. for three years, and the defendant replies that B. made a lease to him for part of the years; it is a departure. R. 1 Rol. 387.

Replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln; avowry for rent, plea in bar, that the lime-kiln was affixed to the freehold; and holden bad by the court, because a departure from the declaration. *Niblet v. Smith*, B. R. H. 32 G. 3. 4 T. R. 504.

In debt on a bond to deliver plate won at a horse-race, if it appeared before A. in three months that it was not his own horse; the plaintiff averred that it appeared before A. within three months that it was not the defendant's own horse; the defendant pleaded that it was his own horse; the plaintiff replied that it appeared to A. that it was not; the defendant rejoined that it was, and that it did not appear to A. that it was not; this is a departure from the bar. R. 3 Lev. 241.

If the defendant by bar prescribes for a park within a forest inclosed *ad voluntatem suam*, and by rejoinder says it was inclosed, so that deer of the forest cannot get in, it will be a departure. Bridg. 25.

If in action on the case on promise, defendant pleads infancy, plaintiff replies it was for necessaries, and defendant rejoins, an account stated *quodq. superinde prœd. quer. exoneravit* defendant; it is a departure. *Hillier v. Plympton*, P. 7 G. Str. 422.

If the plea is, no *ca. sa.* and the rejoinder, *erronice emanavit*, it is a departure. *Hyder v. Warren*, T. 3 & 4 G. M. 13 G. Fort. 333. Ld. Raym. 1449.

So, if to *sci. fa.* on recognizance of bail, defendant pleads no *ca. sa.* against principal; replication there was; rejoinder that it did not lie four days in the sher-  
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iff's office, is a departure. *Elliot v. Lane*, M. 26 G. 2. 1 Wils. 334. 4 T. R. 587. n.

A plea by bail, sued on their recognizance, that no *ca. sa.* was duly issued against the principal, is maintained by a rejoinder, showing that the *ca. sa.* set forth in the replication, was issued into an improper county. 16 East, 39.

Trespass for impounding plaintiff's mare ; plea, damage feasant by eating [\*] and spoiling the grass ; replication, right of common ; rejoinder, the mare was mangy, is a departure. *Semb. Palmer v. Stone*, T. 32 & 33 G. 2. 2 Wils. 96.

Defendant in his plea, justified taking cattle damage feasant, and afterwards rejoined that they were taken surcharging the common. This was holden to be a departure. *Ellis v. Rowles*, C. P. M. 24. Geo. 2. Willes, 638.

If defendant justifies in assault and imprisonment, under a *ca. ad respond.* ; and plaintiff replies, defendant released him, and afterwards imprisoned him, and prays judgment, because defendant has confessed the trespass ; this is nought, and plaintiff should have made a new assignment. *Scott v. Dixon*, P. 26 G. 2. 2 Wils. 8.

To an action of debt on a bond, the defendant pleaded in bar the subsequent intermarriage of the obligor and obligee ; the plaintiff replied, that the bond was made in contemplation of a marriage to be had and solemnized between her and the obligor, and with an intent, that in case the marriage should take effect, and the plaintiff should survive him, the plaintiff should have the full benefit and effect thereof. And the replication was holden good on demurrer. *Milbourn v. Ewart*, B. R. M. 34 Geo. 3. 5 T. R. 381.

If to an action for an annuity, the defendant plead, that in such memorial was enrolled, as is required by the annuity act ; and the plaintiff reply, setting for a memorial, which on the face of it is pursuant to the act ; a rejoinder denying the truth of a fact alleged by the memorial, and which, if untrue, vitiates it, is a departure from the plea. 4 T. R. 585. 2 H. B. 280.

Debt on bond, given by defendant on his marriage, with condition that he would permit his intended wife, either during the marriage, or by will, to dispose of 50*l.* out of his personal estate : plea that defendant had not prevented his wife disposing of that sum ; replication, setting forth a particular disposition of the money by the wife, a request on defendant to pay, and a refusal by him ; rejoinder, that defendant had not any personal estate, out of which he could pay the 50*l.* ; and holden on demurrer that it was bad, because it was a departure from the plea. *Cossens v. Cossens*, C. P. M. 11 Geo. 2. Willes's Rep. 25. a.

A rejoinder, that the judgment was confessed, as well for the defendant's own demand, as in trust for other creditors, is a departure from a plea which stated that the sum for which the judgment was confessed was due to the defendant. 1 M. & S. 395.

< Miscellaneous cases. *Spencer v. Southwick*, 10 Johns. Rep. 259. S. C. reversed on error. 11 Johns. Rep. 573. *Spear v. Bicknell*, 5 Mass. Rep. 125. *Larned v. Bruce*, 6 Mass. Rep. 57. >

### (F 8.) If it maintains a common law claim by a statute.

So, if the plaintiff in his declaration claims an estate by the common law, and maintains it in his replication by an act of parliament, this is a departure. Co. Lit. 304.

In debt on bond, by sheriff against his bailiff, to pay him twenty pence for every defendant's name in every warrant in mesne process, defendant pleads he had paid it ; plaintiff replies that he had not paid it for A. ; defendant rejoins stat. 23 H. 6. and 3 G. ; it is a departure ; for pleading, he had paid, and rejoining he ought not to pay ; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin*, M. 4 G. 2. C. B. Fort. 368.

So, if a man avows, for that A. being seised in fee granted to him a rent ; and the defendant pleads, nothing in the tenements at the time of the grant ;



and the plaintiff rejoins that A. was *cestuy que* use in fee, which use is now executed by the statute of uses ; this is a departure. Pl. Com. 105. b.

So, if a defendant in trespass pleads a lease for fifty years, and the [\*]plaintiff replies, that the lease was void by a statute ; a rejoinder, that a proviso in the said statute affirmed it for twenty-one years, is a departure. R. Pl. Com. 105. b.

So, in trespass, for impounding his cattle, if the defendant pleads that he impounded pursuant to the statute, and the plaintiff replies, that he impounded in another county, it is a departure. R. 3 Lev. 48.

Or, if the defendant justifies by a distress for rent, and the plaintiff replies that he used and sold them, to which the defendant rejoins, that he sold the distress pursuant to the statute 2 W. & M., it will be a departure ; for it should have been so alleged at first. Semb. Lut. 1425.

In *formedon* the tenant pleads a fine by tenant in tail, the demandant says, *partes finis nihil habuerunt* ; rejoinder, that the tenant in tail was seised of the use, is departure. Dy. 291.

To an information for refusing an office ; the defendant pleaded, that he was not qualified by not receiving the sacrament within a year ; the attorney-general replied, that he ought to have received it ; the defendant rejoined, that by the act of toleration, 11 W. & M., he was excused ; this is a departure. R. 1 Sal. 168.

Otherwise, if the statute maintains the declaration. Vide post, (F 11.)

(F 9.) Or, custom.

So, if he entitles himself by common law, and afterwards maintains it by a custom, it is a departure. Co. Lit. 304. a.

As, if he pleads a feoffment, and the plaintiff replies, within age ; and the defendant rejoins, that by the custom there, an infant of the age of fifteen years may make a feoffment. D. 3 Leo. 40. Otherwise in Kent. 1 Lev. 81.

But it is otherwise, if the custom be alleged only in maintenance of the declaration ; as in covenant against an apprentice, if the defendant pleads within age, and the plaintiff replies, that by the custom of London an infant may bind himself an apprentice ; this is no departure. Semb. Cro. El. 653. Semb. cont. 1 Lev. 81.

(F 10.) Or, by matter tantamount.

So, if the defendant entitles himself to an estate, generally, as, by a feoffment in fee, he cannot maintain it by other matter tantamount, as by lease and release, &c. Co. Lit. 304. a.

If he pleads not guilty, he cannot by rejoinder say that he was pardoned. Hob. 271.

Departure was fatal on a general demurrer.

But now, since the stat. 4 & 5 Ann. 16. which says, the judges shall give judgment according as the very right of the cause shall appear to them, without regarding any omission or defect in any pleading, there ought to be a special demurrer ; for, notwithstanding such departure, the whole matter appears, whereon the court may give judgment. Per C. B. T. 7 Ann.

(F 11.) What shall not be a departure.

But matter which maintains and fortifies the count or bar, is not a departure ; as, if the tenant in assize pleads a feoffment by A., and the [\*]de-

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mandant replies that A. disseised him, and then enfeoffed the tenant, and afterwards he re-entered ; rejoinder, that the demandant released to A. before his feoffment, is no departure. Co. Lit. 304. a. Pl. Com. 105. b.

Otherwise if the release was after the feoffment. Vide ante, (F 7.)

So, if the plaintiff declares on a lease, generally, and the defendant pleads, nothing in the tenements ; if the plaintiff replies, that the first lease was by indenture, this is no departure. Semb. Leo. 156. 3 Leo. 203.

So, if the plaintiff in his declaration shows a charter for discharge of toll, and the defendant pleads a resumption of all liberties by statute ; the plaintiff may reply that they are revived by a subsequent statute ; and this is no departure. R. Cro. Car. 257. Yel. 13.

So, in an action for practising physic, contrary to the charter 10 H. 8. confirmed by the stat. 14 H. 8., if the defendant pleads the stat. 34 H. 8. 8., it is no departure ; if the plaintiff replies that by the stat. 1 Mar. 9. the charter 10. and stat. 14 H. 8. were confirmed, notwithstanding any other statute, &c. to the contrary. R. Cro. Car. 256. R. 2 Cro. 121.

On an action on a statute, if the defendant pleads that it was repealed, the plaintiff may say that it was revived by another statute. 1 Lev. 81.

So, if the defendant pleads that it was expired, the plaintiff may say that by another statute it was made perpetual. Ibid.

If, in trespass, the defendant justifies for a distress damage feasant, the plaintiff may say that he afterwards converted to his own use ; for this shows the taking to be a trespass *ab initio*. R. 1 Sal. 221.

So, in trespass for taking his horse, if the defendant justifies as a stray ; replication, that he used it, is no departure. R. 2 Cro. 147.

In waste against a lessee, without saying by indenture, if the defendant says *nil habet in tenementis* ; replication, that he leased by indenture, is no departure. R. 1 Leo. 156.

So, in debt on bond, if the defendant pleads performance, the plaintiff replies that the covenant was to account for all money received, and that he received such a sum, the defendant rejoins that he was robbed of that sum ; this is not a departure. R. 1 Vent. 121. 2 Lev. 5.

If on bond to indemnify from tonnage due to A., defendant pleads *non damnificat.*, and plaintiff replies that A. distrained for said tonnage, and defendant rejoins that nothing was due to A. for tonnage ; it is no departure. Owen v. Reynolds, M. 5 & 6 G. 2. Fort. 341.

In debt on bond, conditioned that A. shall not run away during his apprenticeship ; defendant pleads A. did not run away ; replication that A. was bound for seven years, and ran away before the end of them ; rejoinder, that it was only for five years ; this is not departure, but an explanation or fortification of the bar. Long v. Jackson, M. 27 G. 2. 2 Wils. 8.

A plea by bail sued on their recognizance, that no *ca. sa.* was duly issued against the principal, is maintained by a rejoinder, showing that the *ca. sa.* set forth in the replication was issued into an improper county. 16 East, 39.

So, if the plaintiff in his replication varies from his count in a thing not material, it is no departure ; as, in *assumpsit*, if he alleges a promise twenty years past, and when the defendant pleads the statute of limitations, replies, *assumpsit infra sex annos* ; for the time of the [\*]promise in the declaration was not material. R. 1 Lev. 110. per three J. Cro. cont. Cro. Car. 334. Vide infra. [Cole v. Hawkins, H. 3 G. 3. Str. 21. Matthews v. Spicer, T. 2 G. 2. Str. 806.]

Otherwise, in case of a promissory note. Stafford v. Forcer, P. 1 G. Ibid.

If to *assumpsit* laid on 26th March defendant pleads tender on 2d April, and [\*156]

plaintiff replies that before the tender, *scil.* 12th February, he sued a *lat.*, it is well. *Spicer v. Matthews*, M. 4 G. 2. Judgment of B. R. affirmed in C. Sc. Fort. 375.

So, if he alleges a promise in the parish and ward of Cheap, and afterwards in his replication says that it was at A. beyond the ~~cheap~~, viz. in the parish and ward aforesaid. R. 1 Lev. 143. 1 Sid. 228.

In *assumpsit* by an executor, upon a promise to pay a collateral sum on request, if he alleges *quod licet requisit. per testat.*, and specially requested by the executor, he did not pay, and the defendant alleges that the testator requested, and the action was not brought within six years after, the plaintiff by his replication may say the testator did not request; for *licet requisit. per testat.* in the declaration is not material. R. Hard. 41.

In debt against an administrator generally, if the defendant pleads no assets by sale of lands; replication that he has assets, is no departure. R. 2 Cro. 140.

So, if defendants sever in plea, the plaintiff may vary from his count, and it will not be a departure; as, in ejectment, supposing an ejectment, supposing an ejection by six defendants, if one pleads not guilty, and the others plead specially, the plaintiff may reply to the others, supposing the ejection by them only. R. 2 Leo. 199.

Otherwise, if one makes default or dies, and does not sever himself by plea. 2 Leo. 199.

So, a departure, when it is of necessity, is no prejudice; as, if a man counts of a gift in tail, he may maintain it by a recovery in value in his replication; for he cannot have another count. Co. Lit. 304. a.

In trespass for an assault at H., the defendant pleads *molliter manus imposuit* in removing him off his ground at A.; plaintiff replies that he had a way in the ground of the defendant at A., &c., it is no departure; for the place is not material, and therefore he may maintain the trespass in another place. R. Lut. 1437.

In trespass, 1 May, the defendant justifies the same day, the plaintiff may assign trespass on another day, and it will not be a departure; for the day is not material. Per Holt, 1 Sal. 222. Mod. Cas. 115. 120.

So, in any personal action, where the time is not material. R. 1 Sal. 223.

In *replevin in alta via regia*, the defendant justifies damage feasant, the plaintiff replies that he has a way there *tam equestr. quam pedestr.*, it is not a departure; for the mention of *via regia* was not material. R. 1 Sal. 222.

} The plaintiff, in his replication, may introduce new matter to explain the declaration, and it will not be a departure. *Hallett v. Slidell*, 11 Johns. Rep. 56.

To an action of *assumpsit*, the defendant pleaded his discharge under an insolvent act; the plaintiff replied, that subsequently to the discharge, and before the commencement of the suit, the defendant assented to, ratified, renewed and confirmed the promises mentioned in the declaration; this was held not to be a departure. *Shippey v. Henderson*, 14 Johns. Rep. 178.

Though the replication must not depart from the count, in regard to any material allegation, yet, if the plea is evasive, the plaintiff may avoid the effect of it, by restating his cause of action with more particularity, and thus meet the defence. *Troup v. Smith's Exrs.* 20 Johns. Rep. 33.

If the declaration be in the name of two plaintiffs, and the replication purports to be in the name of one only, it is a departure. *Graham v. Graham*, 4 Munf. 205. }

## (F 12.) When the replication shall ascertain the count.

Where the writ and count are general, the certainty shall be shown by the replication; as, in assize. Pl. Com. 84. a.

So, in *assumpsit*, to give as much as he agreed to give to A., if the defendant says that he did not agree to give any thing to A., the [\*]plaintiff by his replication, must show with whom he agreed. R. Yel. 17.

So, in *assumpsit*, in consideration that he promised to pay all A.'s debts, it is sufficient, though he does not show what debts, and to whom he paid; for if the defendant pleads that he has not paid such a debt, the certainty shall be shown in the replication. Yel. 18.

## (F 13.) When it shall make a title.

So, in real actions, where the writ and count are general, the demandant must make a title to his replication; as, in *formedon*, on a feoffment to the use of the father of the demandant in tail, before the st. 27 H. 8. brought after the statute, the demandant may declare generally, and, on *ne dona pas* pleaded, show the special matter in his replication. Bro. *Formedon*, 49.

So, in trespass, if the defendant pleads in bar, and the plaintiff traverses the point in bar, which is found for the plaintiff; yet, if he appears not to have the possession, the plaintiff shall not have judgment, if he does not make a title by his replication. Poph. 2.

If plaintiff declares on possession, (which is only good against a wrong-doer,) and defendant pleads *liberum tenementum*, plaintiff must show a title in the replication. *Vernon v. Goodriche*, Str. 5.

But where a title need not be shown to maintain the action, there, though the defendant confesses and avoids the plaintiff's title, it is sufficient for the plaintiff to traverse or deny the matter alleged by the defendant, without showing any title by his replication. Cro. El. 288. 671. [*Goslyn v. Williams*, T. 5 G. Fort. 378.]

As, in ejectment or trespass, if the defendant pleads title in A., who was disseised by the plaintiff or his lessor, and afterwards re-entered, the plaintiff may traverse the disseisin, without making a title at large to himself or his lessor. R. Cro. L. 891.

So, if he pleads title in A., who demised to the defendant, and gives colour to the plaintiff by a feoffment to him by A. which passed nothing, the plaintiff may traverse the demise without making title; for the bar by the colour given admits possession in the plaintiff, if there was not a demise. R. Poph. 1.

## (F 14.) When it shall assign a breach.

So, in debt on a bond for nonperformance of an award, if the defendant pleads, no such award, it is not sufficient for the plaintiff in his replication to show the award, but he must also assign the breach. R. 1 Sand. 102. Cro. Eliz. 320. R. Yel. 25. Cro. Eliz. 899. Adm. Yel. 78. R. Yel. 152, 153. Hob. 198.

So, if the defendant pleads what is tantamount to no such award; as that two arbitrators did not make the award, but an umpire made it. Scmb. Lut. 529. R. 2 Cro. 220.

So, in all cases, where the defendant's plea does not admit a breach. Sho. 214.

So, in *quare impedit*, if the bishop pleads that he claims nothing but as ordinary, and that the plaintiff did not present within six months, by rea-  
[\*157]

son of which he presented by lapse ; and the plaintiff replies that he presented A. within six months, he ought also to say the bishop refused him, otherwise the disturbance alleged is not complete. Semb. Hob. 198.

[\*]So, in debt on a bond to pay the charges in such a suit, if the defendant pleads payment, the plaintiff by his replication must show a breach, it being a bond to do a collateral act. Adm. Lut. 422.

In debt on bond to save harmless from money, plaintiff shall be obliged to pay, or from suits, &c. defendant pleads *non damnificat*. Replication, that plaintiff was obliged to pay, and did pay without saying how he was obliged, is good. Simmons v. Langhorne, H. 27 G. 2. 2 Wils. 11.

Debt on bond conditioned to indemnify plaintiff from all claim of dower of A. a widow now married to B., and from all charges that may arise from such claim ; plea, that defendant had indemnified plaintiff ; replication, that B. married A., and brought bill in chancery for arrears of dower, and that plaintiff had answered and expended 8*l.* 10*s.* costs. R. good on special demurrer. Challoner v. Walker, P. 31 G. 2. 1 B. M. 574.

If on a bond to pay *quamdiu* he enjoyed such an office, the defendant says that he enjoyed it for the life of B., and paid the whole time ; plaintiff may reply that he did not pay for that time, or that he enjoyed it *diutius* ; but then he ought to assign a breach that he did not pay. R. 1 Mod. 227.

In debt on a bond for performance of covenants, if the defendant pleads performance, the plaintiff in his replication, must assign a breach. Hob. 14.

In debt on bond to perform articles, the breach must be as particular as the covenant. Stibbe v. Clough, M. 6 G. Str. 227.

So, the breach assigned must be certain, and cannot be so general as in a declaration in covenant ; and therefore that he sold to A. and others several times between such a day and such a day, is not sufficient in a replication. Semb. 1 Sal. 140.

So, the breach must be sufficient. Semb. Sho. 213.

In debt on bond to perform award, and plea, no award ; if plaintiff replies an award to pay 16*l.* 10*s.* and costs, and thereupon to give mutual general releases, and assigns for breach the nonpayment of the 16*l.* 10*s.* only, it is good. Fox v. Smith, M. 6 G. 3. 2 Wils. 267.

Award to pay 4*l.* 15*s.* and costs in an inferior court, and to give releases, breach for not payment of 4*l.* 15*s.* good ; for the award was good for that, though void for the costs, and the releases make final end. Addison v. Gray, H. 6 G. 3. 2 Wils. 293.

Debt on bond, conditioned that A., agent of a regiment, should pay all the money he receives from the paymaster for the use of the regiment, to the officers and soldiers ; plea, that he had paid, &c. replication that he had received 1400*l.* which he had not paid, is good ; for it is but one breach. Cornwallis v. Savory, P. 32 G. 2. 2 B. M. 772.

And if the plaintiff does not assign a breach, when he ought, it is fatal on a general demurrer. D. Hob. 233. 198.

So, if he assigns a bad breach.

And it shall not be aided after verdict. R. 2 Sand. 180. R. Yel. 153.

### (F 15.) When not.

But, if the defendant pleads a plea which, if it be true, will go to the whole, there, if the plaintiff by his replication denies the matter of the plea, he need not show a breach ; as, in debt on a bond for nonpayment after notice of his return to England, if the defendant pleads that he had not notice, and the plaintiff takes issue thereon, he need not show in his replication that he did not pay. R. Cro. El. 220.



[\*]So, on a bond with condition to redeem a mortgage, &c. ; if the defendant pleads that there was no mortgage, and the issue is taken thereon, the plaintiff need not show that it was not redeemed. Per three J. Cro. El. 399. Yel. 25.

So, on a bond to perform on an award, if the defendant pleads *non submit*, or other collateral matter, the plaintiff may join issue thereon, without assigning any breach. Adm. Lut. 528. Yel. 78. R. 1 Sid. 290.

So, if the defendant shows an award, and pleads performance of part only, and issue is taken thereon. R. 3 Lev. 24.

If a bond be conditioned for performance of covenants in an indenture, and the defendant pleads *non est factum*. R. 1 Vent. 114. 126.

Or, on condition to pay when a ship returns, and the defendant says it did not return, but was lost. R. Carth. 116.

So, if there be demurrer to the replication, as well as if issue be joined and found for the plaintiff; as, in debt on a bond, with a condition to pay if a ship returns before such a day, the defendant pleads that it did not return, the plaintiff replies that it did return, and there is a demurrer thereon, and R. that it was good, without saying, that he did not pay. Per Cur. Pas. 2 W. & M. inter Meredith and Allen. Sho. 148. 1 Sal. 138. and the case cont. 1 Sand. 102. 1 Sid. 340. was denied. R. cont. 1 Sid. 340. 1 Sand. 102.; but there Sand. makes a *quare*. R. acc. 1 Lev. 55.

So, in a *scire facias* on a recognizance to the king, if the defendant pleads a general pardon, whereby the recognizance is discharged, the plaintiff may reply, without assigning a breach. R. Hard. 377.

So, in debt on a bond for performance of covenants in an indenture, the defendant shows the indenture, and pleads that there are no covenants therein, the plaintiff upon oyer of the indenture may demur, without assigning any breach; for by the oyer it appears that the plea was false. R. 1 Sand. 317.

### (F 16.) Must not be double.

So, a replication ought not to be double; and therefore, if the plaintiff replies, *de son tort demesne absque hoc*, that there is no such record, it is bad. R. 3 Lev. 243. Vide ante, (C 33.—E 2.)

In debt on bond payable 23d March, defendant pleads payment on the 22d; plaintiff replies he did not pay either on the 22d or 23d, or at any time after making the bond, it is ill. *Jernegan v. Harrison*, T. 6 G. Str. 317.

But, if the defendant plead several matters as inducement to his bar, and the plaintiff replies to each matter, though an answer to one had been sufficient, yet it is not double; as, in an action against an executor, who pleads several judgments, and no assets ultra, if the plaintiff gives a several answer to each judgment, it is not bad. R. 1 Sand. 337. But Sand. cont. 338. R. acc. 2 Sand. 50.

So, if the plaintiff by his replication counterpleads the defendant's plea, and assigns a breach thereon, it is not double; as, if the defendant pleads no such award, and the plaintiff replies that such an award was made, and that the defendant did not pay, &c. 1 Mod. 227. Vide ante, (F 14.)

If the defendant pleads that he enjoyed the office for the life of B., [\*]and paid during his life; if the plaintiff replied that he enjoyed *diutius*, and did not pay it, it is not double. R. 1 Mod. 227.

If defendant pleads one entire qualification, and plaintiff has several excuses which he cannot plead entire, he may plead them severally; but if he has one mat-  
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ter which goes to the whole, he must plead it entire and rely upon it. *Humphreys v. Churchman*, T. 9 G. 2. B. R. H. 289.

The court will not give leave to reply double, for it is not within the statute *Horn v. Scawel*, Fort. 335. *Barnes*, 363.

{ As to duplicity, Vide *Otis v. Blake*, 6 Mass. Rep. 336. }

(F 17.) Must be certain.

So, a replication ought to be certain. { Vide *Griffin v. Pratt*, 3 Conn. Rep. 513. }

And it ought to be more certain than a declaration. *Semb.* 1 Sal. 140.

As to certainty in a declaration and bar, vide ante, (C 17, 18, 19, — E 5.)

(F 17.) But certainty to a common intent is sufficient.

But certainty to a common intent is sufficient; as in trespass for three loads of oats, the defendant justifies for damage feasant; the plaintiff replies that *tempore quo et diu antea* he was parson, and took for tithes; though he does not say that he was parson at the time of the severance, yet it shall be intended. *R. Cro. Car.* 63. Vide ante, (C 24.—E 7.)

So, in trespass, if the defendant justifies by a devise from B., and the plaintiff says that it descended to him as cousin and heir to B., and traverses the devise, it is sufficient without saying, how cousin. *R. 2 Cro.* 86.

In debt on bond, oyer of the condition, to prosecute error in the hustings, and pay damages and costs, if judgment affirmed; plea, that the writ was prosecuted with effect, and judgment not yet affirmed; replication, that writ was *nonpross'd* in the hustings, good, though it does not set forth before whom the hustings were held, nor that the writ was returnable. *Lowfield v. Satchwell*, H. 19 G. 2. *Wils.* 123.

That defendant has not paid money to the officers and soldiers of a regiment, according to the several proportions of their pay, is sufficiently certain. *Cornwallis v. Savery*, P. 22 G. 2. 2 B. M. 772.

That defendant was attached by writ of privilege is sufficient, without setting forth the return, for it refers to the return, whenever it was. *Barnes*, 163.

(F 18.) *De son tort demesne*, when it shall be replied generally :—If the plea goes merely in excuse.

If defendant pleads a plea merely in excuse of an inquiry to the person, or the replication of another, *de son tort demesne sans tiel cause* is a proper replication. 8 Co. 67. a. *Crogate*.

As, in an action of trespass for an assault and battery, if the defendant pleads *son assault demesne*. 8 Co. 67. a.

Or, that the plaintiff entered upon his possession, and he *molliter manus imponit*, and if he has damage it was on his own assault. *R. Latch*, 128. 221.

So, in trespass for false imprisonment, if the defendant pleads that the plaintiff broke the peace, and he being a constable, and present, took him to carry him to a justice of the peace. *Bro. de son Tort*, 18.

[\*]Or, that he being a constable, took him being a vagrant. *Bro. de son Tort*, 20.

Or, on hue and cry for a robbery. *Bro. de son Tort*, 39.

Or, that he restrained the plaintiff, being a lunatic. *Bro. de son Tort*, 44. 51.

That he being rector and the tithes severed, the plaintiff would have car-  
[\*161]

ried them away, and in defence of his tithes *mollior manus imposuit, &c.* R. 2 Cro. 224, Yel. 157.

So, in an action on the case for defamation, if the defendant excuses himself by hue and cry. 8 Co. 67. a.

The replication *de injuria* is only allowed where an excuse is offered for personal injuries, and not even then, if the excuse relates to any interest in land, or is founded on a commandment. 1 B. & P. 76. < Vide Lyttle v. Lee, 5 Johns. Rep. 112. Hyatt v. Wood, 4 Johns Rep. 150. Plumb v. M'Crea, 12 Johns. Rep. 491.

So, in trespass *qua. clau. freg.* to a plea of *liberum tenementum*, a replication of *de injuria, &c.* is bad. Hyatt v. Wood, *ut supra*.

So, in replevin, to an avowry. Hopkins v. Hopkins, 10 Johns. Rep. 369.

But the defect is cured by verdict. Lyttle v. Lee and Hopkins v. Hopkins, *ut supra*. >

### (F 19.) Or justifies by matter of fact.

So, if the defendant by plea makes a justification, which consists wholly of matter of fact, *de son tort demesne* generally, is a good replication; as, in false imprisonment, if the defendant justifies by process out of the admiralty, hundred, or county court, or other court not of record. 8 Co. 67. a.

In an action for words, if the defendant justifies, by reason of a robbery by the plaintiff. 2 Leo. 103. 1 Saund. 243.

In an action for a conspiracy, if the defendant justifies for suspicion of felony, on which the defendant was bound by a justice of peace to prosecute. Win. Ent. 108. Vide Ent. 147.

In trespass, if the defendant justifies the taking for a heriot. Bro. *de son Tort*, 5. 10.

Or, for estovers.

In replevin, if the defendant avows for the penalty of a bye-law made within the manor according to the custom. R. 3 Lev. 48. Lev. Ent. 156.

So, by the st. 43 El. 2. in replevin, if the defendant avows for a distress for the poor's rate.

So, though in the plea a matter of record or title be alleged as inducement to the plea. Vide post, (F. 20, 21.)

The replication *de injuria* puts in issue all the matters, but nothing else, contained in the plea. 2 Blk. 1165. 3 Burr. 1385.

### (F 20.) When it is not a good replication generally.—If matter of record be mixed with the fact.

But *sans tiel cause* goes to the whole plea; and therefore, where the defendant justifies by matter of record as well as matter of fact, *de son tort* generally, is not a good replication, for then the matter of record will be put in issue; but he ought to say *de son tort &c.* and traverse the matter of fact; as, in false imprisonment, if the defendant justifies by a *capias* to the sheriff and a warrant to him, the plaintiff ought not to reply *de son tort*, without traversing the warrant. 8 Co. 67. a. R. 3 Lev. 65.

So, in an action for words, if the defendant justifies by reason of perjury in a court of record, it is not a good replication without a traverse. Semb. 2 Leo. 81. 102.

[\*] In trespass, if the defendant justifies by a process out of an inferior court of record. Semb. Hard. 6.

So, if the defendant justifies by the custom of a manor; *de son tort, &c.*

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generally, is not a good replication, but it ought to traverse the custom. R. Hob. 76. Cont. per three J. Lev. acc. 49.

Yet, where the defendant justifies by custom of foldage, *de son tort* is a good replication. Kit. 223. a.

And if the matter of record be only inducement to the plea, *de son tort, &c.* may be replied generally; as in trespass, if the defendant pleads a presentment in a swainmote-court, and that he, as forester, requested him to answer, and because the plaintiff refused, he took him; *de son tort, &c.* is a good replication; for the presentment is only inducement. D. 2 Leo. 81.

(F 21.) If the defendant claims an interest in or out of the land.

So, if the defendant in his own right claims any interest in the land, *de son tort, &c.* generally, is not a good replication. 8 Co. 67. a. R. 2 Sand. 295. 1 Lev. 307.

So, if he claims an interest out of the land: as common. R. 8 Co. 67. a. Or, rent. 8 Co. 67. a.

Or, a way or passage over the land. 8 Co. 67. a. R. 2 Cro. 599.

Or, trees cut down on the land. R. Cro. El. 539.

So, if he claims, as servant to another, any interest in or issuing out of the land, &c.; it is not a good replication, without traversing the command, where this appears to be material. 8 Co. 67. a.

And so it seems to be intended. Cro. El. 14. 540.

And therefore, in replevin, if the defendant, as bailiff, avows for damage feasant, and the plaintiff pleads that A. was seised of two parts, and by his license he put his cattle there, *de son tort*, generally, is not a good rejoinder. R. on Demurrer. Cro. El. 812.

So, if the plaintiff makes title in his declaration, and the defendant pleads a title in avoidance of the cause of action, or in destruction of the plaintiff's title; *de son tort, &c.* is not good without a traverse; as, in trespass for taking his servant, if the defendant pleads that the father of the servant held of him in chivalry, &c., and he took him as his ward; *de son tort, &c.* is not good without a traverse of the seigniorship. D. Yel. 158. 1 Brownl. 215.

So, in trespass, if the defendant makes title by devise; *de son tort, &c.* is not a good replication. R. 1 Lev. 307.

To an action of trespass, for taking and impounding a gelding, the defendant pleaded that the *locus in quo* was called W., of which the bailiffs and burgesses of S. were seised in fee, and that the defendant as their servant, and by their command took the cattle damage feasant. To this the plaintiff replied *de son tort*, generally; and judgment was given for the defendant on demurrer. Cockerel v. Armstrong, C. P. T. 11 Geo. 2. (Com. 582.) Willes, 99. S. C.

When defendant in an action of trespass, justifies in his plea taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying *de injuria sua* is bad. Cooper v. Monke, C. P. H. 11 Geo. 2. Willes, 52.

[\*] Yet, if the title alleged be only inducement; *de son tort, &c.* may be replied generally; as, in battery, if the defendant pleads that he was seised in fee of a close, and had cut his corn, and the plaintiff came to take away his corn, and he in defence, &c.; *de son tort, &c.* is a good replication. R. Yel. 157. R. Latch, 221. 1 Brownl. 215.

This replication is bad when it puts several distinct matters in issue. Cooper v. Monke, C. P. H. 11 Geo. 2. Willes, 52. Cockerel v. Armstrong, C. P. T. 11

Geo. 2. (Com. 582.) Willes, 99. S. C. Bell v. Wardell, C. P. E. 18 Geo. 2. Willes, 202.

(F 22.) If the defendant claims by authority from the plaintiff himself.

So, if the defendant justifies by authority derived mediately or immediately from the plaintiff, though he claims no interest, yet *de son tort*, &c. generally, is not a good replication. 8 Co. 67. a.

As, by the license or command of the plaintiff. Kit. 221. b.

(F 23.) Or, by authority of law.

So, if the defendant justifies by authority of law; as, to view waste. 8 Co. 67. b.

So, if he justifies by statute; as, where the defendant justified the cutting of leather as a searcher by the st. 1 Jac. 1. 22. Semb. 2 Rol. 694. l. 10.

But it was replied. Bro. Vad. 435.

(F 24.) How it shall be pleaded.

If a man pleads *de injuria sua propria*, without saying *absque tali causa*, it is bad. Semb. 2 Cro. 599. R. 1 Rol. 47.

But this shall be aided after verdict. D. 1 Vent. 70. Semb. cont. 1 Sid. 341. Hard. 40.

So, if the defendant pleads *de injuria sua propria absque hoc quod non est culpabilis*, or nothing in arrears, &c.; it will be bad on a special demurrer; for it is a frivolous introduction to the general issue. R. Sal. 583.

But, *de son tort absque tali warranto*, where the defendant justifies by warrant, seems good. Lut. 1460.

And *de son tort* to several pleas, is good; for *absque tali causa* refers to all. R. Leo. 124.

So, if the plaintiff replies, *de son tort*, &c. generally, when he ought not, there shall be a repleader.

And *de son tort* generally, when he ought not, will be aided after verdict by the statute of jeofails; for it is form only. R. Hob. 76. R. Ray. 50. R. 1 Brownl. 200.

Yet, it was held bad on a general demurrer. 3 Lev. 65.

So, if the plaintiff replies specially, and does not say, *de son tort*, &c. where he ought, it shall be aided after verdict by the st. 32 H. 8. 30. R. 1 Sid. 445. 1 Vent. 70.

(F 25.) Replication bad in part, is bad for the whole.

An entire replication bad in part, is bad for the whole; as, in an action on *indebitatus assumpsit* and *insimul computasset*, if the defendant pleads the statute of limitations, and the plaintiff replies, that the money [\*] in the several *assumpsits* are due in trade, as merchants; if this should be good as to the *insimul computasset*, yet being bad as to the *indebitatus assumpsit*, it is bad for the whole. Semb. 2 Sand. 127. Vide 1 T. R. 40.

But this rule cannot apply to any case where the objection is merely on account of surplusage; therefore where the replication states matter sufficient for the plaintiff to maintain his action, though it state something afterwards which is inaccurate, the whole is not vitiated. 3 T. R. 374.

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(G) TRAVERSE.

(G 1.) By what words it shall be.

The proper words of a traverse are, "without this," or, *absque hoc*. 1 Sand. 22.

But words equipollent are sufficient; and therefore a traverse by the words, *et non*, is sufficient; as, if the defendant pleads that A. was taken by a warrant returnable *die S. post Oct. pur. et non virtute warranti retorn. die V.* is a good traverse of a warrant returnable, *die V.* R. 1 Sand. 22. 1 Lev. 192.

So, if a replication be *de son tort absque tali warranto*, seems good, though it does not say expressly *absque hoc* that there was such a warrant. Lut. 1460.

So, if there be a traverse of the matter alleged by the other party, without saying *modo et forma prout*, &c.; it will be well. Semb. 2 Leo. 5.

Yet, a traverse ought to be by express words and not argumentative; as, if he traverses *absque hoc quod intravit et sic se intrusit*. Yel. 170.

If a traverse be *absque hoc quod est culpabilis aliter aut alio modo*; this does not extend to the time but only to the matter of fact. Lut. 1457.

A traverse ought not to conclude to the country; for it is in the negative. R. 3 Mod. 203. } Vide *Waterman v. Haskin*, 7 Johns. Rep. 283. *Snyder v. Croy*, 2 Johns. Rep. 428. *Bindon v. Robinson*, 1 Johns. Rep. 516. *Patcher v. Sprague*, 2 Johns. Rep. 462. }

(G 2.) When necessary.

Generally matter of fact expressly alleged in the count or bar, if it is not confessed or avoided, must be traversed; as, in trover, if the defendant justifies by seizure as a waif, he must traverse the conversion. R. Mod. 572. Per two J. Cro. El. 693.

In replevin, if the defendant claims common in six acres, and the plaintiff alleges, that he had common in forty acres, he must traverse that he had common in six acres only; for it cannot be intended the same common. R. 1 Leo. 44.

So, in debt for rent upon a lease of ten acres, if the defendant says, that he leased the ten acres, and also a rectory, &c. he must traverse a lease of ten acres only. 1 Leo. 44.

So, in an action upon the case that the defendant overcharged a warehouse, by means whereof it fell; if the defendant pleads that it was ruinous and therefore it fell, he must traverse that it was overcharged. Per two J. Manwood cont. Cro. El. 285.

So, in trespass for the taking of four pigs distrained, one after impounding, the others before; if the defendant pleads tender of amends, he must traverse the impounding; for a tender afterwards is too late. R. Lut. 1262.

[\*] So, if the defendant justifies the publication of a libel to A.; one of those to whom he is charged to have published a libel, he ought to traverse all others to whom he is charged to have published it. R. 1 Lev. 241.

So, in trespass, if defendant justifies at another place than is laid in the declaration, a traverse is necessary. *Benjamin v. Howell*, M. 18 G. 2. 1 Wils. 81.

So, if the defendant makes a local justification, he ought to traverse all places except that to which the justification extends; as, if he justifies as sheriff, he must traverse all places except his own county. 2 Cro. 372. R. Cro. El. 504.



If he justifies a trespass by a release, &c. at a day precedent, he must traverse all times after. 1 Sal. 222.

If he justifies as constable, he must traverse all places but his own vill. Co. Lit. 282. b.

If, as other officer, all places but those within his authority. Sav. 25. 57.

If he justifies a distress for damage feasant, in A. he must traverse all other places. Co. Lit. 282. b. R. Cro. El. 705.

Or, a distress for rent, he must traverse all places not demised. R. 1 Sid. 293, 294.

So, if he justifies by *molliter manus imposuit* for entering his house in A., he must traverse all other places. R. Cro. El. 705. 1 Rol. 19. R. Lut. 1437.

So, if he justifies by process out of an inferior court, he ought to traverse all places out of their jurisdiction. Semb. 1 Rol. 264, 265. Lut. 1563.

So, if he justifies by process, &c. he ought to traverse all times before the *teste*, and after the return. R. 1 Rol. 406.

If he justifies as sheriff, &c. he ought to traverse all times before his office or since. R. 1 Lev. 216.

And such justification must not be larger or narrower. Vide post, (G 15, 16.)

And, if the place or time is not material, the justification must be in the place and on the day alleged in the declaration. Vide post, (G 12.)

So, if a man makes title by feoffment, and the other pleads a prior feoffment, he ought to traverse the last. Vide post, (G 3.)

Or, by grant of a copyhold, and the other pleads that the manor came, by reason of the vacancy of a bishoprick, &c. to the hands of the king, who made a prior grant to him, he must traverse the last grant by a copy; for he has not confessed seisin in him who made the last grant and avoided it. R. Cro. El. 754. Vide post, (G 3.)

If the defendant avows for rent granted by A. seised in fee, and the plaintiff says that A. was seised in tail and died, and the land descended to him, he must traverse the seisin in fee. Semb. Dy. 312. b.

If the plaintiff counts that A. seised in fee demised for years, &c. and the defendant pleads that before the seisin of A., B. being seised, devised to him in tail, and that he was seised till A. disseised him and leased, &c.; if the plaintiff says that the defendant afterwards levied a fine to A. he ought to traverse the disseisin. R. Jon. 402.

[\*]So, if the plaintiff alleges a seisin in fee, and the defendant shows that he had a conditional fee, he must traverse the seisin in fee alleged; for it would be intended an absolute fee. R. Yel. 140.

So, if the plaintiff alleges seisin till A. died without issue, and the defendant confesses an estate till B. died without issue, he must traverse the estate alleged by the plaintiff; for they are different estates. R. Yel. 140.

So, if the plaintiff counts of an estate to him and his heirs male, and the defendant of one to him and his heirs female, he must traverse the first estate surmised by the plaintiff. Yel. 141.

So, if the plaintiff claims by prescription, and the defendant confesses a title by deed, he must traverse the prescription. Yel. 141.

So, if the plaintiff claims a seisin in fee, (which shall be intended in possession,) and the defendant entitles himself to a lease prior to the plaintiff's seisin, (by which it appears he had a fee only in reversion,) he must traverse the seisin of the plaintiff in fee. Per two J. Cro. cont. Cro. Car. 324. 8 Mod. 319.

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If the plaintiff declares on a demise of two chambers, and the defendant pleads a demise of two chambers and another room and entry therein, he must traverse the demise of the two chambers only. R. but Sand. thought that the traverse would be more proper on the part of the plaintiff. 1 Sand. 207. Ray. 170. 1 Lev. 263.

So, in detinue of a chest with charters, if the defendant pleads delivery of a box with charters as a pledge, he must traverse the detinue of a chest.

In disceit against an attorney for appearing without warrant, who pleads that he appeared only for another defendant from whom he had a warrant, he must traverse the *corin*. R. Dy. 361. b.

If the defendant says that A. being seised demised to him, and the plaintiff replies that A. before enfeoffed him, he must traverse the demise, except where he adds an entry and demise, and afterwards a re-entry. Cro. El. 754.

So, if the defendant confesses and avoids the matter of the count, &c. only by argument, he must traverse: as in debt against an executor, who pleads that he is administrator, he must traverse administration as executor. Kit. 229. b.

In debt against an administrator, who pleads that he is executor, he must traverse the dying intestate. Kit. 229. a.

In an action upon the statute of labourers, and count that the defendant was a vagrant and refused to serve; if the defendant pleads that he was in the service of A., he ought to traverse; without this that he is a vagrant. Kit. 229. a.

In partition, if the defendant pleads that he is sole seised, he must traverse that he holds *pro indiviso*. Kit. 229. b.

In trespass, the defendant pleads a lease granted by the master and fellows of a college; if the plaintiff replies that at the time of the demise alleged there were no fellows, he must traverse *absque hoc* that the master and fellows demised. Kit. 229. b.

If the defendant alleges seisin of a manor, and thereon justifies for a heriot, if the plaintiff replies that B. was jointly seised with him, he must traverse *absque hoc* that defendant was sole seised. R. 2 Mod. 60.

[\*] If the defendant alleges seisin in him of a manor and a fine levied, and the plaintiff replies that he himself was and still is seised, he must traverse the defendant's seisin at the time of the fine. R. 1 Leo. 77. 1 And. 166. Sav. 86.

If he alleges seisin in A., by whose command he took damage feasant, and the plaintiff alleges that the father of A. was seised and leased for life to B., under whom he claims, he must traverse the seisin of A. at the time of the taking. Dub. 3 Mod. 318. R. Carth. 165.

If the defendant alleges seisin in A., who devised to his father in tail, who died seised, and that defendant entered and was seised till disseised by the plaintiff; if the plaintiff confesses the seisin and devise, but pleads a recovery and conveyance to himself, he must traverse the disseisin. R. Cro. Car. 494. Jon. 402.

If he alleges seisin in A., and a demise and grant of the reversion to the plaintiff, to which the plaintiff confesses seisin of a moiety by A.: and a demise and grant to the plaintiff, who granted to the owner of the other moiety, he must traverse that A. was seised of the whole at the time of the demise.

So, though the matter of the count or bar be confessed and avoided by

the plea in the affirmative, he ought to traverse in the negative, otherwise there can be no issue. *Vide post*, (R 3.)

As, in trespass for taking six beasts, the defendant justifies the taking by agreement, the plaintiff replies that they were other six, he must traverse in the negative; without this that he took the same six. *Kit. 229. a.*

In debt on a bond dated 2d April, and *primo deliberat.* 2d May, the defendant pleads a release 9th April, and that the bond was delivered 2d April, he must traverse *absque hoc* that it was *primo deliberat.* 2d May. *Kit. 229. b.*

In debt on a bond conditioned to deliver an inventory of all the goods of B., the defendant says that he delivered an inventory of such goods which are all, the plaintiff replies that B. had such other goods; he must traverse that those named by the defendant are all. *R. Dal. 52.*

So, in all cases the replication must confess and avoid the bar, or traverse it, except where it is matter of law, supposal, or matter that cannot be tried. *1 And. 166. 1 Leo. 77.*

If plaintiff in his replication makes several averments, which the defendant does not traverse in his rejoinder, to which plaintiff demurs, judgment shall be for plaintiff; for whatever is materially alleged must be traversed, or it is always taken to be admitted. *Nicholson v. Simpson, P. 6 G. Str. 297. Fort. 356.*

If a custom is pleaded, and plaintiff replies another custom repugnant to it. *Kenchin v. Knight, M. 23 G. 2. 1 Wils. 253.*

In an action of trespass, the defendant pleaded that an ancient messuage and twelve acres of land were immemorially parcel and a customary tenement of the manor of A.; and that there is a custom in the manor that, from time whereof, &c. the customary tenant of the said customary tenement, for all the time aforesaid, has had right of common, &c. The plaintiff in his replication traversed the custom, and was admitted upon the trial to prove that the messuage was built within twenty years, and not upon the site of an ancient house, though the replication seemed to admit the antiquity [\*] of the tenement. *Dunstan v. Tresider, B. R. M. 33 Geo. 3. 5 T. R. 2.*

< So, in assumpsit upon a promissory note, where the defendant pleaded the tender of a certain sum in full of the plaintiff's demand, being less than the sum appearing to be due, from the face of the record, the plaintiff should have traversed the sufficiency of the tender; otherwise, the plea will be good on demurrer. *Vermont Bank v. Porter, 5 Day, 316.*

So, a material fact alleged in the bar must be traversed; it cannot be avoided by the allegation of a collateral fact. *Larned v. Bruce, 6 Mass. Rep. 57. Vide Norton v. Sweet, 15 Mass. Rep. 169.*

Miscellaneous cases. *Snyder v. Croy, 2 Johns. Rep. 227. >*

(G 3.) When not necessary:—If the party confess and avoid.

But, generally, if the matter of the count or bar be confessed and avoided, a traverse is not necessary; as, if the defendant justifies as assignee of a term for years of A., if the plaintiff claims by a prior assignment from A. of the same term, he need not traverse the assignment to the defendant, for he has confessed and avoided it; for after the assignment to the plaintiff, A. could not assign to the defendant. *R. Mo. 551. Cro. El. 650. Per two J. three cont. Ow. 142. R. per three J. 6 Co. 24. b. R. Mo. 557. Dub. 2 Vent. 212.*

So, if a man claims a copyhold, and the other party claims by a prior grant, he need not traverse the subsequent grant, but the traverse must be of the prior grant. *R. 2 Cro. 299. Yel. 221. 2 Bul. 1. Vide ante, (G 2.)*

So, if a man claims by patent, the other who has a prior patent need not [\*168]

traverse the last patent, though it be not fully avoided; for by possibility the king might have a new title after the first, and before the subsequent grant. Per three J. Cro. Car. 581.

So, if the defendant pleads that the plaintiff abated after the death of A., and the plaintiff replies that A. devised to him, he need not traverse the abatement. R. Yel. 151. Vide Lut. 1558.

Yet if the feoffment of A. be pleaded, and the other pleads a prior feoffment from A., he must traverse the last feoffment; for possibly A. might gain a new estate by disseisin after the first feoffment. Dy. 171. Cro. El. 650. 6 Co. 25. a. R. 2 Cro. 681. R. Cro. El. 30. Vide ante, (G 2.)

So, if there be a suggestion in prohibition of a perpetual unity, if the defendant shows that the abbey was founded within time of memory, he need not traverse the prescription, for it is sufficiently avoided. R. Yel. 31.

Otherwise, if the land was in the hands of farmers; for then the prescription must be traversed. R. Yel. 31.

So, in *quare impedit*, if the plaintiff counts that A. being seised in fee, presented B., and granted the next avoidance to him, &c.; and the defendant pleads that A. being seised in fee enfeoffed others to the use of himself for the life of C., and then granted the next avoidance, and that C. died, he need not traverse the seisin in fee at the time of the grant, for he has confessed and avoided it. Dub. Hob. 102.

So, in a *scire facias* against tertendants, who plead that the cognisor and others were jointly seised, and the cognisor died, &c., if the plaintiff replies a bargain and sale, this avoids the joint seisin; and therefore it need not be traversed. R. 2 Sand. 28.

So, in avowry by distress for rent of a third part, if the plaintiff in bar entitles himself to the other two parts in common, he need not traverse the taking in the third part only; for he has confessed and avoided. R. 2 Vent. 228. 383.

If the defendant justifies imprisonment by the sheriff's warrant upon a *capias*, and that the plaintiff escaped, whereon he by the same warrant [\*]retook him, if the plaintiff replies he escaped with the sheriff's consent, he need not traverse the second taking. R. 1 Brownl. 197.

Yet, if there be not a full confession and avoidance, there may be a traverse, though it is not necessary; as, in replevin, if the defendant avows a distress in two parts of the land, and the plaintiff makes title to a fourth of the third part, if the avowant conveys to him the two parts also, he may traverse that he was seised of the fourth only. R. Hob. 80.

So, in *quare impedit*, the plaintiff counts of a grant of A. seised in fee, the defendant shows that he was seised only *pur autre vie*; yet he may traverse the seisin in fee. Semb. Hob. 103. Mo. 869.

And to add a traverse is the surest way. D. Mo. 869.

{ So, to a plea of the statute of usury, the plaintiff may reply, that it was not corruptly agreed, &c. without a traverse. Waterman v. Haskin, 7 Johns. Rep. 283. Vide Caines v. Brisbane, 13 Johns. Rep. 9.

And if the defendant plead a right in bar, and the plaintiff reply his own right as a qualification of the defendant's right, he should not traverse the defendant's right. Spear v. Bicknell, 5 Mass. Rep. 125.

When the plaintiff confesses and avoids the defendant's bar, he may not add a traverse, and thereby preclude the defendant from denying the facts which avoid his defence. Oystead v. Shed, 13 Mass. Rep. 520, {

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## (G 4.) If he justify the whole action.

So, if he justifies the whole fact, a traverse is not necessary ; as, in battery, if the defendant justifies by casualty, he need not traverse *aliter aut alio modo*, D. Mo. 864. Cro. El. 667.

If in trespass for taking and detaining cattle at A., defendant justifies for damage feasant at B., and that he impounded at A., he need not traverse. Ryley v. Parkhurst, T. 21 & 22 G. 2, 1 Wils. 219.

## (G 5.) If it be a matter of law.

So, if a man alleges matter of law in bar or avoidance of another's title, a traverse is not necessary ; as, in ejectment, if the defendant pleads a fine to the king and his heirs male of his body, whereby the king entered and was seised in tail, if the plaintiff confesses the fine, and says the king entered and was seised in fee, there need not be a traverse of the seisin in tail ; for it is matter of law. R. Pl. Com. 280. b.

So, in trover, if the defendant plead a seizure ; as, prisage, to the king's use, there is no need to traverse the conversion ; for he confesses the seizure ; and whether it be a conversion is matter of law. R. Yel. 200.

So, in trespass, if the defendant pleads a sale in the market, he need not traverse the plaintiff's property. 5 H. 7. 14. a.

So, if he plead seisure ; as, a waife or wreck. Ibid.

So, to an avowry for rent by prescription, if the defendant pleads unity of possession, there is no need to traverse the prescription ; for it is matter of law whether unity extinguishes it. Ibid.

So, if the defendant pleads that the plaintiff and his blood have been villains time whereof, &c. the plaintiff replies that he is a bastard, he need not traverse the prescription. Ibid.

So, in *quare impedit*, if the plaintiff alleges seisin in king Edward, and that he died seised, and the rectory descended, &c. ; if the defendant pleads an appropriation by king Edward, he need not traverse the dying seised. R. Pl. Com. 496. a.

Yet matter of law, when connected with fact, may be traversed ; as, simony. Rast. Entr. 532.

Seisin in fee or in tail. Yelv. 140.

The right of a county to repair a bridge. 2 Lev. 112.

## [\*](G 6.) Or, a matter of record.

So, if a man alleges a matter of record, there ought not to be a traverse to it ; for it cannot be tried by the country ; as, in debt upon a recovery in an inferior court of record, if the defendant traverses the recovery, it is bad. R. per three J. 1 Lev. 193.

In *scire facias* against bail in error, who plead *quod judicium pendet indeterminatum*, if the plaintiff traverses it, it is bad ; for it must be determined by the record. R. Sal. 521.

## (G 7.) Or, not triable.

So, if he alleges a matter of fact, which is not triable ; as, an intent or design to make, it is not traversable ; because it cannot be tried ; as, in waste, if the defendant pleads an assignment, and the plaintiff replies that the assignment was contrary to the stat. 11 H. 6. 5., to the intent that the plaintiff should not know against whom to bring his action, and that the de-



defendant continued the possession, traverse that the assignment was not made to the intent, &c. is bad ; for he ought to traverse the permanency of the profits. R. 5 Co. 77. b.

So, a traverse, that he used a garden *secundum veram intentionem indenturæ*, is bad ; for the intent was not traversable. R. 3 Lev. 167.

So, in an action, *quare retinuit canem sciens ad mordendum oves consuet.*, the *sciens* is not traversable, but must be given in evidence. R. 1 Rol. 4. l. 45.

Yet, a traverse, that he arrested *virtute warranti*, is good. Semb. 1 Sand. 23.

So, a traverse of an entry by command, where by inducement the command appears material. R. Cro. El. 463.

So, a plea, that he left money with the plaintiff *ea intentione* that he should pay, is good ; for he may traverse *quod non reliquit modo et forma*. R. Skin. 397.

### (G 8.) Or, not expressly alleged.

So, a matter not expressly alleged, need not be traversed ; as, if the defendant pleads a grant, used to be made, of an office to such person or persons as B. pleased, and the plaintiff replies that it used to be granted to one person only, he need not traverse to several ; for it is not expressly alleged. R. 10 Co. 59. a. Vide post, (G 13.)

If the plaintiff alleges that the dean, archdeacon, and chapter of B. leased to him, and the defendant pleads that the dean and chapter of B. leased to him, *absque hoc* that there is such a corporation as dean, archdeacon, and chapter of B., it is not good. Semb. Lane, 18.

So, if a man traverses a matter not alleged, it is bad ; as, if a breach of covenant be assigned that he did not pay the salary of an office, and the defendant traverses that he did not receive the profits of the office. R. 2 Vent. 79.

So, if the defendant justifies by process out of an inferior court, the plaintiff cannot traverse that the matter arose out of the jurisdiction ; for it was not alleged. R. Lut. 1560.

So, in trespass for cutting down trees, if the defendant says that the bailiff appointed the taking of trees for repairs, for which he took those [\*]trees ; traverse, that he did not appoint those, is bad ; for this was not alleged. R. Lut. 1480.

### (G 9.) Or, if there be a good issue before.

So, if it be good issue by an express affirmative and negative, there ought not to be a traverse ; as, in an *audita querela* to avoid execution on a statute, alleging that *obtulit* the money at the day of payment ; if the defendant pleads that at such a day he demanded it, and no one was ready to pay, he ought not to traverse, *absque hoc quod* plaintiff *obtulit* ; for there was an issue before. R. Cro. El. 755. But it appears that the plea was bad in another point. Yel. 38. 2 Cro. 13.

But in order to take issue on a single point, after an affirmative and negative, a traverse may be allowed ; as, where the defendant pleads another action depending for the same cause, if the plaintiff replies that they are several causes, *absque hoc* that it was for the same cause, it is good. R. on a special demurrer, 1 Vent. 101. Ray. 199. 1 Mod. 72.

(G 10.) Of what things a traverse shall be:—O the most material thing.

A traverse ought to be of the most material thing and the effect of the bar; and therefore in debt for rent on a lease for years, if the defendant pleads a descent to A., who was disseised by the lessor, but after the lease, and before any rent due entered, the plaintiff ought to traverse the disseisin, not the descent. R. Mo. 539.

So, in trespass, if the defendant pleads that A. being seised made a lease to him, the plaintiff shows that after the disseisin of A. his father was seised and died seised, and the land descended to himself he must traverse the lease. R. Mo. 574. 6 Co. 24. a.

So, if the surrender of a copyhold into the hands of A., the plaintiff's steward, be alleged, the plaintiff ought to traverse the surrender; not that A. was not his steward. R. Cro. El. 260.

So, in *quare impedit*, the most material point ought to be traversed. D. 1 Rol. 235. R. Lit. 15. R. Cro. Car. 61. 105. 586. R. Vau. 10, &c. 56, &c. Lut. 1630.

In trespass, if the defendant pleads that the land was demised to A. who set out his tithes, whereon he, as parson, took them, the plaintiff must traverse the taking as tithes, and not the demise. R. Jon. 89, 90.

If the defendant pleads a gift to his ancestor in tail and several descents, whereby the land came to him; if the plaintiff confesses the gift, and alleges a feoffment by the donee, under which he claims, and traverses that the donee died seised, it is bad; for he ought to traverse the last dying seised for there might be a remitter. R. Dy. 107. a.

In debt upon a bond for appearance *Oct. Martini*, if the defendant pleads the st. 23 H. 6. and that he was imprisoned by a writ returnable *quinden. Martin.*, if the plaintiff replies that he was imprisoned by a writ returnable *Oct. Mart.*, he ought to traverse the imprisonment by writ returnable *quinden. Mart.* R. 2 Lev. 175.

In prohibition, on a libel for the profits of land given for charity, upon suggestion that the land was given to his own use, if the defendant [\*]pleads a gift for charity, and traverses the gift to his own use, it will be good. R. 2 Bul. 20.

In prohibition plaintiff declared, suggesting that defendant had no jurisdiction, setting out that the dean and chapter was from a translation of prior and convent, and suggesting that where dean and chapter are of royal foundation, the archbishop has no power. The archbishop pleads and traverses that the prior and convent is of royal foundation. On demurrer, judgment for defendant. Fort. 329.

But the defendant may traverse any part of the declaration which is material to the plaintiff's title; as, if the plaintiff alleges that A. being seised enfeoffed B. who died seised, and the land descended to his heir, who demised to him, and afterwards A. ousted him and disseised his lessor, and conveyed to the defendant; the feoffment, descent, or disseisin may be traversed. Dy. 366. a.

In trespass, if the defendant pleads, that before the trespass A. was seised and leased to him, the plaintiff may traverse the seisin or the lease, for both are material to the defendant's title. 6 Co. 42. a.

So, if he pleads that A. being seised, enfeoffed B., who enfeoffed C. under whom he claims, the plaintiff may traverse seisin or any mesne feoffment, if the defendant does not claim by any mesne conveyance from the plaintiff himself. 6 Co. 24. b.

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So, if he pleads that A. being seised, in fee conveyed to B. in tail, under whom the defendant claims; the plaintiff may say that D. being seised granted to A. in tail, &c. and may traverse that A. was seised in fee, or the conveyance in tail. R. 2 Cro. 681.

If he says that A. being seised leased to him, and afterwards disseised him and leased to the plaintiff, he may traverse the demise to the defendant, or the disseisin. R. Cro. El. 798.

So, if the plaintiff alleges a title when he need not, he gives the defendant the advantage of traversing; as, in replevin, if the defendant avows damage feasant in black acre, and the plaintiff in bar says he was seised in fee of a close, of which the defendant ought to repair the fences, and for default, &c. the defendant may traverse his seisin in fee. Per three J. Wind. dubitante, Dy. 365. Vide post, (G 16.)

In ejectment on the demise of B., if the defendant pleads that B. enfeoffed A., and the estate descended to his heir, who demised to him, and then B. disseised, &c.; the plaintiff may traverse the feoffment to A. or the descent, though it need not be alleged. Dy. 366. a.

In replevin, the defendant says that B. was seised in fee, which descended to A., and avows for a rent-charge granted by A.; the plaintiff says that B. was seised in tail, which descended to A., and he granted and died, *absque hoc* that B. was seised in fee; the traverse of the seisin in fee by B. is good, though the seisin by A. was more material. R. 2 Cro. 44. Yel. 54.

So, also, if two points are material, the defendant may traverse one or the other; as, in trespass, if the defendant pleads that A. was seised and demised to him, the plaintiff may traverse the seisin or demise. R. Hard. 317.

So, in debt upon a bond for appearance, if the defendant pleads the st. 23 H. 6. 10. and that he was arrested by a writ returnable at another day, and the plaintiff replies that it was upon a writ returnable [\*] on the first; either the one or other writ is traversable. Semb. 1 Sand. 22. 1 Lev. 192. 2 Lev. 174.

In trespass, if the defendant says that A. was seised in fee, and being outlawed, and found by inquisition, &c. the defendant entered upon a *levari*; the plaintiff replies that B. being seised demised, to him, he may traverse the seisin of A., or that the land was not found by inquisition. R. Hard. 316.

In an information for an intrusion, if the defendant says that the king by patent granted to A., who, being seised in fee, enfeoffed the defendant, the attorney-general may traverse the grant of feoffment, but not that A. was not seised in fee; for that is the consequence of the grant. Sav. 58.

So, if the defendant does not rely on the most material matter, but goes to another point, he gives the plaintiff the advantage of traversing it; as, in an action for disturbance of common, if the defendant pleads that he is lord of the soil, and put rabbits there, and prescribes for a warren, though he might justify, as lord, the putting beasts of warren on the common; yet when he goes on and prescribes for a warren, the plaintiff may traverse the prescription. R. Lut. 108.

In trespass, if defendant justifies cutting a beam, whereby tiles are thrown down, and the replication traverses its being previous, it is not *ad idem*., and therefore bad. Humphreys v. Churchman, T. 9 G. 2. B. R. H. 289.

{ Though a traverse can be taken to a single point only, yet, as that point may

consist of a number of facts, the traverse need not be confined to a single fact, but may deny them all. *Strong v. Smith*, 3 Caines' Rep. 160.

And in trespass, where the defendant pleads, that a third person was in possession of the *locus in quo*, and demised to him for a year, the plaintiff may traverse both the seisin and demise. *Ibid.*

Where several matters are alleged in a plea, which constitute one entire defence, and form one connected proposition, it is sufficient, if the replication traverse the material allegation in the plea. *Bradner v. Demick*, 20 Johns. Rep. 404. *Vide Beckley v. Moore*, 1 M'Cord, 464. >

### (G 11.) What thing is traversable.

And therefore any fact, which appears to be material, is traversable, though it be only suggestion; as, in prohibition, a suggestion of a refusal by the spiritual court of a plea (which ought to be allowed) in a suit there for tithes, or other matter of their cognisance, is traversable, otherwise their jurisdiction in any case might be taken away by such a suggestion. R. 2 Co. 45. a.

Otherwise, where the refusal is not the cause of the prohibition. R. Mo. 425.

So, any surmise, which takes away the jurisdiction of the court, is traversable. Cro. El. 511.

So, place or time, where it appears to be material, is traversable. *Vide ante*, (G 2.)—Post, (G 12.)

And therefore in replevin, a place where, &c. must be assigned; for it is traversable. R. Hob. 16.

So, the consideration in *assumpsit* is traversable, where it is executory. D. Cro. El. 201. Hob. 106. 1 Rol. 43. [Dougl. 21.]

Otherwise, if the consideration be executed. D. Cro. El. 201. Hob. 106. 1 Rol. 43. R. 1 Rol. 401. [Dougl. 21.]

So, conveyance to the action, where it appears to be material, is traversable; as, in action for words, if the plaintiff alleges that he took an oath before the mayor of London, and the defendant said, You are foresworn; that he took an oath before the mayor is traversable. R. Cro. El. 169. D. 1 Rol. 43.

So, where both parties make title by the same person, the conveyance is traversable. D. 2 Rol. 362.

So, in replevin, generally it is not traversable that he is not bailiff, if the defendant makes cognizance as bailiff. Bro. tit. Bailiff, 1. 26 H. 8. 8. b.

[\*]Nor, in trespass, if he justifies as bailiff. 33 H. 6. 3. Per three J. 1 Rol. 46. But Rol. makes a *quære*.

Yet, if it appears to be material, it is traversable; as, if it be pleaded, that he did it by the command of another. R. 1 Leo. 50.

Or, without the privity of his master. R. 3 Leo. 20.

So, that he did it voluntarily, is traversable, where it appears to be material; as, in debt for a fee upon a voluntary acceptance of knighthood, if the defendant pleads, that he accepted it by the command only of the king, he must traverse that he accepted it voluntarily; for this is the essence of the action. Semb. Lut. 381.

So, the intention is traversable, where it appears to be material; as, if a payment to A., to the intent that he should pay rent in arrear, be alleged in bar to covenant by A. for nonpayment of rent in arrear to B., that he paid A. to such intent, may be traversed. R. 1 Sal. 196,

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So, if the defendant in trespass pleads *molliter manus imposuit*, it is traversable. R. Lut. 1436.

So, a *que* estate is traversable, where it is material, though both parties do not claim from the same person. Bro. *Que* Estate, 8. 11. 35, 36, 37.

In debt for annuity, the demand is not traversable, though there is a covenant to pay if demanded personally ; for the grant is substantive, and the covenant is substantive. Hope v. Colman, H. 4 G. 3. 2 Wils. 221.

{ Facts stated by way of inducement, are not traversable ; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement. Fowler v. Clark, 3 Day, 231. }

(G 12.) But traverse of an immaterial thing is bad.

But traverse of a thing not necessary to be alleged, is bad ; as, in a *scire facias* for restitution of money recovered by a judgment, which judgment was afterwards reversed, if the defendant pleads payment *absque hoc* that he is *adhuc possessionatus de denar. prædict.*, the traverse is bad ; for it was not necessary to be alleged in the declaration, that the defendant *fuit adhuc possessionat. inde*. R. Cro. Car. 328.

So, in an action for an escape, if the plaintiff alleges that he voluntarily permitted A. to escape, and the defendant pleads fresh pursuit, he ought not to traverse that the escape was voluntary ; for that was not necessary to be alleged. R. 1 Vent. 211. 217. Agr. Lut. 382.

If, on false imprisonment, defendant justifies under a process *que est eadem*, &c., and traverses being guilty, *aliter*, &c. it is unnecessary. Courtney v. Satchwell, P. 12 G. Str. 694.

So, in trover for a horse sold, and the money converted to his own use, the defendant ought not to traverse the conversion of the money. R. Cro. El. 555.

In *assumpsit* on a charter party, where the agreement is to sail with the first fair wind, he ought not to traverse that he did not sail with the first fair wind ; for it is not material : if he performed the voyage, it is sufficient. Hard. 69.

So, traverse of a place or county, where it is not material, is bad ; as, in trespass, &c. if the defendant justifies at another place or county, and traverses the place alleged, where the place is not material, it is bad ; for he must plead his justification in the same place. Co. Lit. 282. b. 1 Leo. 39. Cro. El. 184. 705. R. Cro. El. 842. R. 1 Rol. 395, 396. Adm. Lut. 1437. 1 Sal. 173. R. Cro. El. 667. R. 2 Mod. 271. Sav. 22, 23.

[\*]So, if he justifies upon another day, and traverses the day alleged, where the time is not material. Semb. Hard. 40.

So, in trespass, for taking five cart loads of hay, if the defendant justifies for tithes, and traverses that there were five cart loads of hay, it is bad ; for the quantity is not material. R. 3 Lev. 228. Lut. 1315.

If the defendant pleads to a bond, that part of the sum, *scil.* 1500*l.* was won by gaming, and plaintiff traverses the 1500*l.* ; it is bad. Colborne v. Stockdale, H. 8 G. Str. 493.

If the plea ties up plaintiff to prove the estate alleged in the declaration, when another estate would do ; it is bad. Palmer v. Ekins, M. 2 G. 2. Str. 817. Ld. Raym. 1550.

But where place or time is material, every other place or time must be traversed. Vide ante, (G. 2.)

So, traverse of a thing alleged after a *viz.* or *scil.* is bad. D. 1 Lev. 245.

In an action on a bond, the defendant must set forth in his plea the sum really



due on the bond, before he is entitled to set off any cross demand on statute 8 Geo. 2. c. 24. s. 5. ; and such averment is traversable, though laid under a *viz.*, the averment being material. *Grinwood v. Barrit*, M. 36 Geo. 3. 6 T. R. 460.

So, in trespass for chasing cattle *ita quod*, one of them died ; traverse of what comes after *ita quod*, is bad. R. 1 Lev. 283.

So, if the defendant alleges a discharge of tithes by unity of possession at the time of the dissolution, a traverse of the discharge is bad, but it ought to be of the unity *ratione cujus fuit* discharged ; for a traverse of the discharge is a traverse of the conclusion only. R. Mo. 534.

{ So, where time and place, they being immaterial, are traversed, it will be bad on special demurrer. *Rogers v. Burk*, 10 Johns. Rep. 400.

So, generally, of the traverse of immaterial averments. *Fitch v. Hall*, Kirby, 18. *Suffrein v. Priundle*, Kirby, 112. *Denslow v. Moore*, 1 Day, 290. }

### (G 13.) Or, of a supposal.

So, a traverse of a thing, which is but supposal, is bad ; as, if tenant *in mortdancest*or pleads joint-tenancy with the father of the demandant, he need not traverse that he is sole tenant ; for this is only supposed by the writ. 5 H. 7. 13. a.

So, if the defendant pleads ancient demesne, he need not traverse that it is frank fee ; for this is only the supposal of the writ. 5 H. 7. 13. b.

So, in *assumpsit* against an executor, who pleads that his testator was alive at the time of the writ purchased, he need not traverse his death ; for it is only supposed by the writ and count. Lut. 14.

But matter necessarily included may be traversed ; as, if he pleads that A. was seised, the plaintiff may allege seisin in B., *absque hoc* that A. was sole seised. R. Mod. Ca. 158.

### (G 14.) Or, inducement.

So, a traverse of inducement is bad ; as, in debt against an executor, if the defendant pleads a judgment, and the plaintiff replies, that it is satisfied, but is continued by fraud, the defendant cannot traverse its being satisfied. R. Latch, 111. Hard. 69.

So, in a *scire facias* against an executor on a *devastavit* returned, if the defendant pleads, nothing in his hands, and traverses the *devastavit*, it is bad ; for it was inducement only. R. Hard. 70.

So, in covenant, if the plaintiff assigns a breach, that the house was [\*] burnt and not repaired ; it is bad, if the defendant traverses that the house was not burnt ; for it was only inducement. Hard. 70.

In avowry for rent, if the defendant alleges seisin in *dominio suo ut de feodo talliato*, and the plaintiff, in bar to the avowry, says, that he was seised for life, he need not traverse the seisin in tail ; for it was inducement only. R. 2 Jon. 110. 1 Vent. 340.

So, in *assumpsit*, the consideration, though it be material, is not traversable. D. Cro. El. 201.

Nor, in trover, the conversion. D. Cro. El. 201. R. cont. Cro. El. 97. ; for it is the gist of the action.

But, if the inducement be what entitles the plaintiff to his action, it may be traversed, where the defendant cannot wage his law. Cro. El. 169.

In *quare impedit* the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which, several incidental points are also stated ; the plaintiff in the replication sets forth essential matter which, if true,

would folly avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes ; the defendant in the rejoinder takes no notice of the traverse in the replication, but traverses the matter of inducement which precedes it : the rejoinder is good, and may well pass by the traverse in the replication, that traverse being an immaterial one. *Thrale v. Barker*, C. P. E. 30 Geo. 3. 1 H. Bl. 376.

(G 15.) Or, a traverse more large than necessary.

So, a traverse larger than can be denied, is bad ; as, intrusion, if it be alleged that possessions of the college of the dean and canons of E. founded *apud Westminster*, by dissolution, &c. came to the king, and the defendant intruded, &c., the defendant says, that the foundation was by another name, *absque hoc*, that it was founded *apud Westminster* by the name alleged, it is a bad traverse, because it extends to the place of the foundation. R. 1 Leo. 39.

So, a traverse of the surrender of a copyhold, to such a steward such a day, is bad ; for the day and steward ought not to be part of the issue, but the traverse ought to be of the surrender *modo et forma*. R. Yel. 122. 2 Cro. 202.

So, in an action on the case for stopping three lights, traverse, that he stopped the said three lights, is bad ; for if he stopped any of them, the action lies. Yel. 225.

So, in an action on the case for his wages *ab ultimo Dec. usque 1 Nov.* ; it is bad to traverse the service *ab ultimo Dec. ad 1 Nov.* ; for if he served any part of the time, he ought to have his wages for such time. R. 1 Sand. 269.

So, on an indictment for using a trade for three months, a traverse, that he did not use it for three months, is bad ; for if he used it only for one month, he ought to be convicted. Per 1 Sand. 312.

So, in an action on a policy of assurance, if the traverse be, that *navis et munimenta*, &c. were lost, it is bad, for it ought to be in the disjunctive ; for the plaintiff ought to have damages for any part lost. R. 2 Sand. 206.

So, in debt on a recovery in an inferior court *tent. 1st May*, traverse of a recovery at a court 1st May, is bad. R. 1 Lev. 193.

[\*]So, a traverse of a request at the day or place alleged, is bad ; for the addition of the day and place makes it larger than it ought to be. R. 3 Lev. 41.

Or, of an assignment of a lease at such a day and place. R. Latch, 92.

So, a traverse, that by indenture A. bargained and sold, is bad ; for it makes the indenture part of the issue. Semb. Cart. 218.

In trespass, if the defendant justifies by *molliter manus* to prevent a rescous of an execution, in aid and by the command of a bailiff, traverse, that it was to prevent a rescous in aid and by command of the bailiff, is bad ; for the command is not material. R. 3 Lev. 113.

So, in trespass, if the defendant justifies by *molliter manus imposuit* on his entry into the defendant's close in S., and traverses all places except in S. ; for he ought to say except in the same close. 1 Rol. 19.

So, in trover, if the plaintiff alleges conversion by the sale of the goods ; traverse of the conversion by sale is too large. R. 2 Leo. 13.

(G 16.) Or, more narrow.

So, a traverse, narrower than it ought to be, is bad ; as, in an action for words, if the defendant justifies as a counsel at Westminster, and traverses

the speaking at S., where it was alleged, at any time before or since, it is bad ; because the traverse does not go to the day on which the speaking was alleged. R. 4 Co. 14. b.

So, in trespass, if the defendant pleads that 27 El. it was the freehold of A., and traverses the time before, but not the time after ; for this ought also to be traversed. R. Cro. El. 87.

So, if the defendant justifies by process to the sheriff in another county, *absque hoc*, that it was in the place alleged, it is bad ; for he ought to traverse all places, except the county into which the process goes. R. Cro. El. 860.

So, if the defendant justifies by a lease to him for one year, and that he demised to the plaintiff for a quarter of a year, and after the end of the quarter took the goods damage feasant, and traverses the taking during the quarter of a year, it is bad ; for he ought to traverse all times before and after his lease for a year. R. 2 Sand. 295. 1 Lev. 307.

So, in an action on the case for a recompense for service, if the defendant pleads that he had 8*l.* per annum for such a time, and traverses the service *ab inde*, it is bad ; for perhaps 8*l.* per annum was too small a recompense, and by such traverse the service for that time is excluded, and the plaintiff is deprived of an answer to it. R. 1 Sand. 268.

So, in *quare impedit* where the plaintiff counts that A. being seised in fee, granted to him, &c., if the defendant pleads that A. was seised only for the life of B., who died before avoidance, &c., and the plaintiff maintains his count, and traverses that A. was seised for the life of B., it is bad ; for he ought to traverse that A. was seised *modo et forma* ; for if he was seised for another's life only, be it for the life of B., or any other, the plaintiff's title is avoided. Semb. Hob. 105.

But if a traverse be narrower than it ought, and this tends only to the disadvantage of the defendant, or of him who takes it, it is good ; as, in trespass, if the defendant justifies by a precept out of an [\*]inferior court, and traverses all times before the delivery, and after the return of the precept : yet it is good, though he might have traversed before the *teste* ; for this is to the defendant's disadvantage. R. 2 Lev. 81.

So, a man, by a precise allegation of an estate, may give an advantage of traversing it precisely, though such particular estate is not necessary ; as, if A. alleges that he, being seised in fee, put his cattle into the close ; the defendant may traverse the seisin in fee ; though any estate for life, or years, at will, or license of the owner, would enable him to put his cattle there. R. Dy. 365. a. Vide ante (G 10.)

In trespass, if the defendant justifies under a prescriptive right to a duty, and the like right to distrain for it, and replication traverses the duty, without traversing the right to distrain, it is well enough. Griffith v. Williams, M. 26 G. 2. 1 Wils. 338.

(G 17.) Traverse upon a traverse :—Shall not be allowed when the first traverse is material.

If there be a traverse of a point apt and material to the plaintiff's title, he cannot refuse it, and tender another traverse ; as, if the plaintiff in *quare impedit* counts that the advowson was granted to A. and B. for years, that B. survived and granted to the plaintiff, whereby, &c. ; the defendant pleads that A. survived and granted to him the next avoidance, *absque hoc* that B. survived ; the plaintiff cannot waive the traverse of the survivorship, and traverse the grant of the next avoidance. R. Hob. 105.

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So, if he counts of a seisin in fee in B., who granted, &c., the defendant shows a seisin *pur autre vie*, and traverses the seisin in fee; the plaintiff cannot waive the traverse, and traverse that he was seised *pur autre vie*. Semb. Hob. 104, 105. Mo. 869.

So, a man cannot take a traverse upon a traverse in any case where the first traverse is material. D. Vau. 62.

So, generally, the king cannot take a traverse upon a traverse, if the first traverse goes to the king's title, which does not appear upon record. Vau. 62.

To trespass for fishing in the plaintiff's fishery, defendant pleaded that the place was an arm of the sea, in which every subject had a right to fish; the plaintiff in his replication, claimed an exclusive right by prescription, traversing the general right. It was holden that the defendant ought to take issue on the traverse, and ought not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material one, and will put in issue the true question in dispute between the parties. Orford v. Richardson, B. R. M. 32 G. 3. 4 T. R. 437.

The first traverse was holden bad, and that the defendant might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication. Richardson v. Orford, Exch. Ch. T. 33 G. 3. 2 H. Bl. 182.

(G 18.) But traverse after a traverse is allowed.

But a traverse after a traverse may be allowed; as, in trespass in such a county, the defendant pleads a concord for trespass in every other county, and traverses the county, the plaintiff may join issue on the county, or traverse the concord. Co. Lit. 282. b. R. Mo. 428.

[\*]So, in trespass such a day, if the defendant pleads a license such a day, and traverses all days before or since, the plaintiff may traverse the license. Hob. 104.

So, if he pleads a feoffment, and traverses all days before, the plaintiff may traverse the feoffment. Ibid.

Or, a release, and traverses all days since, the plaintiff may traverse the release. Ibid.

So, if he pleads by a recovery and execution in Sandwich, and traverses the place, the plaintiff may traverse the record of the recovery. R. Mo. 350. Poph. 101. Hob. 104. Lut. 1438.

So, in debt on a specialty for payment of 200*l.* if he did not marry the plaintiff, and refusal alleged, if the defendant pleads that the plaintiff refused first, and traverses *absque hoc*, that he refused before the plaintiff refused; the plaintiff may traverse a tender by the defendant to marry. R. Carth. 99.

So, in all cases where the traverse in the bar takes away the time or place alleged in the declaration, the plaintiff has his election to join issue on the traverse, or to traverse the inducement to the traverse alleged by the defendant. R. Cro. Car. 105.

But when the bar concludes with a traverse to the plaintiff's title, he must maintain his title, and cannot traverse the inducement to the traverse; as, in *quare impedit*, if the plaintiff declares that B. seised in fee presented, &c., the defendant alleges title in the king by inquisition, and traverses the seisin in fee, the plaintiff cannot traverse the inquisition. R. Cro. Car. 105. Semb. Lut. 1630.

Yet, if upon the pleading it appears that the first traverse to the plaintiff's title is immaterial, the plaintiff may traverse the inducement to the traverse by the defendant; as, in *quare impedit*, the plaintiff declares of a seisin in A., who conveyed to B., who conveyed to the plaintiff; the de-

defendant pleads, that before the conveyance to the plaintiff, the church became void, and B. presented him, and traverses the avoidance after the conveyance to the plaintiff; the plaintiff may say, that the church became void after the conveyance to him, and that C. presented the defendant, and traverse that the defendant was in by the presentment of B. Semb. Lut. 1632.

(G 19.) So, traverse upon a traverse, when the first is immaterial.

So, if the first traverse be not to the point of the action, a traverse on a traverse may be allowed.

When a traverse is immaterial, that is, when an issue thereon will not determine the question in controversy, the other side may pass it by, and traverse some other point. 4 T. R. 437.

As, in waste for cutting down and selling trees, the defendant pleads that he used them for repairs, and traverses the selling; the plaintiff may waive this, and traverse the using in repairs: for the first point was not material to the action; it was surplusage in the declaration, and ought not to have been traversed, and the plaintiff might have demurred on the traverse. Hob. 104.

So, in debt on a bond for appearance *die S. prox. post. oct. Pur.* the defendant pleads an arrest upon a warrant returnable *die V.* and the stat. 23 H. 6. 10.; the plaintiff replies an arrest by a warrant returnable [\*]*die S.*, and traverses the warrant returnable *die V.*; the defendant may afterwards traverse the warrant returnable *die S.*; for this only is material and to the point of the action. R. per three J. 1 Sand. 22. 1 Lev. 192.

In *quare impedit*, if the plaintiff says A. was seised in fee and presented B. and granted the next avoidance to the plaintiff, the defendant says that C. was seised before A., and granted to A. for the life of D., who presented B., and then granted the next avoidance to the plaintiff, *absque hoc quod A. tempore concessionis* was seised in fee, the plaintiff may traverse the seisin for the life of D. Hob. 101.

So, in prohibition, for that defendant had petitioned the court of common council who had no jurisdiction, which belonged to the court of mayor and aldermen, the defendants plead, that the common council have the jurisdiction, *absque hoc*, that the jurisdiction is in the court of mayor and aldermen; the plaintiff replies that the common council have it not, and concludes to the country; defendants demur, for that is a departure, and plaintiff ought to have taken issue on the traverse. But per Cur. the first traverse was immaterial. Judgment *pro quer.* King v. Bolton, M. 5 G. Afterwards affirmed in parliament. Str. 117. Fort. 349.

So, the king may take a traverse upon a traverse, though the first traverse be to the point of the action, where the title, upon which the king sues, appears by the office or other matter of record; for the office, &c. is a sufficient title for the king, which he shall not lose, if the defendant does not appear to have a better. Vau. 62.

So, on an indictment for not repairing a bridge, if the defendants plead that A. ought to repair, and traverse that the county ought, the attorney-general may reply that the county ought, and traverse that A. ought, and if it be found that A. ought not, the defendants shall be found guilty. R. Lev. 112. b.

(G 20.) Inducement to a traverse.

A traverse ought to be introduced with a proper title or inducement. Semb. Cro. El. 671. 2 Cro. 86.

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And, if there be no inducement to the traverse, the issue will be a negative pregnant. Semb. Hob. 321.

And the inducement ought to be sufficient in substance : and therefore in prohibition upon a suggestion of a discharge of tithes, if the defendant pleads an agreement between the master of the hospital of B. and the abbot, that the lands shall be discharged only in the hands of the abbot, and traverses the discharge, the inducement is bad ; for it does not show any title in the master of the hospital to the tithes, or how he could make such agreement. R. Cro. Car. 266.

So, if the defendant in his inducement to the traverse shows a defective title, the inducement is bad. R. Cro. Car. 336.

As, if in bar to an avowry for rent by the assignee of a reversion, the plaintiff shows a devise for sale, if the goods are not sufficient for the payment of debts, and a sale to him before the assignment, and traverses the descent to the assignor, it is not good, if he does not show the condition precedent well performed, viz. what debts and what goods there were, whereby the court may judge that they were not sufficient. R. Jon. 328.

So, a man cannot make a part of his plea an inducement to a traverse [\*] of the residue of the declaration ; as, in an action on the case for stopping three lights, if the defendant justifies for two *absque hoc* that he stopped three, the traverse is bad ; for the inducement goes only to part of the declaration. R. Yel. 225.

So, in an action on the case for recompense for his service, if the defendant pleads that he served to such a day, and then departed, *absque hoc*, that he served to the time in the declaration, it is not good ; for he makes one part of the service an inducement to the traverse of the other. R. 1 Sand. 268.

So, in a *scire facias* against bail in error, who plead a judgment depending, not determined, the plaintiff cannot reply that the judgment is affirmed, *absque hoc quod pendent indeterminat.* for this makes a material part of the plea inducement to the traverse. R. Sal. 520.

But inducement to a traverse does not require so much certainty as another plea ; because, generally, it is not traversable. R. Cro. Car. 442.

When it is traversable or not, vide ante, (G 18.)

And therefore if he makes title as cousin and heir, and traverses the devise, it is sufficient, though he does not say how he is cousin. R. 2 Cro. 86.

### (G 21.) When an inducement is not necessary.

But in ejectment on the demise of A., the defendant pleads that the king, being seised in fee, granted to B. for life, who demised to A. and died ; the plaintiff maintains his declaration, and traverses the demise to A. for the life of B. ; this is good without any title or inducement ; for a title is not necessary in ejectment or trespass, and the plaintiff traverses the matter, which destroys his title. R. Cro. El. 671.

So, in ejectment on the demise of A., if the defendant pleads that before the seisin of A., B. was seised and demised to him for years, whereby he was possessed till A. disseised B. and demised to the plaintiff ; replication, that A. was seised in fee, with a traverse of the disseisin, is good without more title or inducement. R. Cro. El. 890.

### (G 22.) When the defect of a traverse shall be aided.

Default of traverse where the plaintiff has not fully confessed and avoided,  
[\*181]

is only form, and aided upon a general demurrer. Per And. 1 Leo. 44. R. cont. per three J. Rhodes acc. 1 Leo. 80. 81. R. acc. Cro. Car. 324. Dub. 3 Mod. 319.

So, if a man takes a traverse, where there is a full confession and avoidance, this makes the plea double, but is aided, as duplicity, on a general demurrer. Semb. Yel. 151. Semb. Cro. Car. 61. R. 2 Vent. 213. R. Lut. 1558. Agreed Lut. 1560. Semb. 2 Sand. 50. R. Carth. 166. Vide ante, (E 2.)

Yet it will be bad on a special demurrer. R. Lut. 1457.

So, a traverse of a point, not the *most* material, if it is material, will be aided after verdict. R. Yel. 54.

So, a traverse of an immaterial point. Semb. Cro. Car. 328. Semb. 3 Lev. 228.

[\*]And now by the st. 4 & 5 Ann. 16. no exception shall be for an immaterial traverse, unless shown for cause of demurrer.

So, a bad and improper traverse. 1 Sand. 268. R. after verdict. Cro. El. (456). R. Cro. El. 161.

So, a traverse too large. Cont. per three J. Two acc. Yel. 122.

Or, too narrow. R. 2 Sand. 5. R. Carth. 165, 166.

So, a traverse after a traverse. Semb. 1 Sand. 21.

So, want of an inducement to a traverse. Hob. 316. 321.

So, want of a traverse not essential, shall be aided by pleading over to other matter. R. 2 Jon. 111.

But defect of a traverse, where there are two affirmatives, is not aided on a general demurrer; for, by default of an issue, the right cannot appear to the court. Hob. 233.

So in trespass, for breaking his wharf and rail, &c. defendant pleads that A. being seised of houses, he and all those, &c. had the use of that wharf, and justifies under him, that he could not use it, and by his orders he broke, &c.; plaintiff replies *de injur. sua propria absque tali causa*, he did said trespass; and then goes on *absque hoc*, that A. and all those, &c. ought to have the use of said wharf; and judgment for defendant on demurrer; for the traverse is double, first traversing all the matters in the plea, and then the prescription. Rains v. Orton, H. 10 G. Fort. 379.

In trespass, for false imprisonment on the 1st October, and from thence for seven months, defendant pleads outlawry and warrant, by which plaintiff was taken at York, and continued in prison, which arrest and imprisonment *sunt ead. insult. et imprisonam*, &c. *absque hoc quod culp.* in Middlesex seu alibi out of York, or at any time before the delivery of writ, or after the return; and judgment for plaintiff, on demurrer; for *quæ est ead. transgressio* is good without traverse; and he says it is the same imprisonment, viz. for seven months, and yet in the traverse leaves out all the time between the delivery and the return. Affirmed in B. R. Carvil v. Manly, 9 G. Fort. 379.

In trespass, for false imprisonment 1st April, defendant justifies by a precept from the sheriff's court, he took him 20th March before, which is the same assault and imprisonment, *absque hoc*, that he was guilty before granting, or after return, or out of the jurisdiction. Judgment for plaintiff; for the traverse is double, *quæ est ead. transgressio* is a traverse, and then another, *abs. hoc*. Courtney v. Satchwell, P. 12 G. Fort. 389.

So, if a traverse be necessary to make a good bar; the omission will be fatal on a general demurrer. R. 2 Mod. 60.

So, if the replication does not traverse the matter of the bar, which is not fully confessed and avoided, the defect shall not be aided by a general demurrer. R. 1 Leo. 80, 81. 1 And. 169. Sav. 88.

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## (H) REJOINDER.

A rejoinder is the defendant's answer to the replication.

And ought not to depart from the bar. Co. Lit. 303. b.

What will be a departure. Vide ante, (F 7, &c.)

And therefore, if the rejoinder does not support the bar, it will be bad on demurrer. 2 Mod. Ca. 343.

If to *assumpsit* defendant pleads tender before exhibiting the bill, plaintiff replies a *latitat* sued out before the tender, defendant rejoins, admitting the promise before exhibiting the bill, but denying the promise before the issuing the *latitat*; it is good; for plaintiff here considers the *latitat* as an original writ. R. on demurrer. Wood v. Newton, M. 20 G. 2. 1 Wils. 141.

If the plaintiff makes several replications, the defendant must rejoin severally to every replication. R. 1 Sand. 337.

[\*]The court will not give leave to rejoin double; for it is not within the statute. Warren v. Ivie, T. 5 G. 2. Str. 908.

If the rejoinder denies the several matters alleged in the replication, it is sufficient that it concludes to the country at the end, without putting the matters in issue severally. R. Lut. 241. Vide ante, (E. 28, &c.—F 5.) a.

No rule to rejoin is necessary where the defendant receives the issue with the *similiter* added by the plaintiff, and does not strike it out. 1 H. B. 254.

Where the defendant is under terms of rejoining gratis, though the plaintiff, after tendering issue to the plea, may add the *similiter*, yet he is not bound so to do, but may demand a rejoinder. 3 B. & P. 443.

## (I) SURREJOINDER.

A surrejoinder or *quadruplicatio* is the plaintiff's reply to the defendant's rejoinder.

## (K) REBUTTER.

Rebutter is so named from *rebouter*, which signifies to repel. Co. Lit. 303.

## (L) SURREBUTTER.

A surrebutter is the reply to the rebutter.

The signature of counsel is equally requisite where the cause is conducted by the party in person as where by attorney. 3 Taunt. 386.

In C. B. a plea of bankruptcy must have counsel's signature. 3 B. & P. 171. 6 T. R. 496.

The rule of C. B. is, that where the plea must be signed by a serjeant, so must the replication likewise, unless it is merely *similiter*. 1 B. & P. 469.

The replication of *nul tiel* record need not have a serjeant's signature. 2 Blk. 810.

There must be a serjeant's signature to a rejoinder in demurrer. 2 B. & P. 836.

Rule relative to the counsel's signature to interrogatories. 5 T. R. 474.

## (M) WHEN JUDGMENT SHALL BE.

### (M 1.) Upon a bad count.

When for default. Vide post, (Y 1.)

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When upon *nil dicit*. Vide ante, (E 42.)

Or, upon confession. Vide post, (Y 2.)

Though a plaintiff or defendant pray a wrong judgment, the court must give such judgment as the party is entitled to. *Rayner v. Pointer*, C. P. E. 16 Geo. 2. *Willes*, 410.

And therefore if the defendant, in a demurrer to a declaration, pray judgment of the declaration, and that it may be quashed and the plaintiff join in demurrer, and the declaration be good, the court will give judgment in chief in favour of the plaintiff. *Ibid*.

If pleading be bad, judgment shall be against him who made the first default; as, if a count or declaration be bad, there shall be judgment against the plaintiff, though the bar is insufficient; as, if debt be by an administrator *durante minore ætate*, or an executor, after the executor has obtained his full age, though the plea in bar be insufficient; yet [\*] there shall be judgment against the plaintiff, for it appears he has no cause of action. R. 5 Co. 29. a. [4 T. R. 224.]

So, if two inconsistent counts are joined in a declaration, the plaintiff cannot have judgment. By Buller J. *Rex v. Cambridge*, E. 28 Geo. 3. 2 T. R. 461.

But if it appears that the plaintiff has no cause of action by the plea only, and not by the declaration, and the plea is defective and bad, the plaintiff shall have judgment; as, in trespass *quare clausum fregit et dejecit* his hurdles affixed to his freehold, if the defendant pleads that the place where, &c. is *communis platea* and prescribes for setting stalls there, &c., but the prescription is bad; the plaintiff shall have judgment; though he has no cause of action, if it was *communis platea*. R. 1 Lev. 184.

The judgment ought to be entered, *ideo consideratum est per Cur. quod. &c.*

But if the judgment be (where the jury find damages to 38*l.* *quod recuperet damna sua predicta per jur. assess. ad 37*l.* nec non, &c.* it will be well; for the words *per jur. assess. ad 37*l.** shall be surplusage. R. Jon. 171.

If there be judgment on a bad count upon a demurrer on motion in arrest of judgment, it shall be, *quod plaintiff nil capiat quia narratio insufficiens*. Mod. Ca. 15.

If the defendant or plaintiff pleads over, he shall not afterwards take advantage of any defect in the plea of the other party, which would be aided on a general demurrer. Per Holt, Sal. 519.

### (M 2.) Upon a bad plea.

If the plea is naught, and the replication likewise, and the defendant demurs, judgment shall be for the plaintiff; for the first fault was in the plea. *Woodward v. Robinson*, P. 6 G. Str. 302. Vide Dougl. 94. to the same effect.

So, if the plea be defective, and the plaintiff makes an idle replication, but the defendant does not rely thereon, there shall be judgment against the defendant. 4 Co. 84. a. Cro. El. 815.

So, if the plaintiff's replication be double. R. 3 Lev. 244.

So, if to a debt upon a bond to stand to an award, if made *super vel ante 7 Maii*, and if not to an umpirage, the plea be, that no award was made *ante 7 Maii*, without saying, *vel super*, if the plaintiff replies, that there was an umpirage, but assigns an insufficient breach, there shall be judgment for the plaintiff; for the plea was not cured by the replication. Per three J. Keeling cont. 1 Sid. 336.

If on debt on bond payable 23d March, defendant pleads payment on the 22d; and plaintiff replies, he did not pay either on the 22d or 23d, or at any time after making the bond, and defendant demurs for duplicity; judgment shall be for plaintiff;

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for the plea is ill first, and if plaintiff had gone to issue upon the plea, the verdict must have been set aside. *Jernegan v. Harrison*, T. 6 G. Str. 317.

So, if the plea does not answer to the whole declaration, whereto the plaintiff demurs, there shall be judgment against the defendant for his bad plea, and not against the plaintiff for the discontinuance. R. 1 Rol. 496. Cont. 1 Rol. 176. R. 2 Bul. 288.

So, if the plea be insufficient in substance, or confess the point of [\*]the action, there shall be judgment against the defendant, though the replication be immaterial and the defendant demurs to it. R. 8 Co. 120. 133. b. R. 9 Co. 110. b.

As, if the plea be uncertain. R. Poph. 209.

So, though issue joined, and verdict for the defendant. Hob. 56. [Broadbent v. Wilks, C. P. T. 16 Geo. 2. Willes, 360.]

For the court will judge upon the whole record, and therefore where the verdict concludes *si sic*, &c. for the defendant or for the plaintiff; yet the defendant or plaintiff shall not have judgment, if it appears on the whole record that he has not a title. R. Mo. 105. 269. Vide post, (S 38. 40.)

If defendant by his plea sets out a bad title to an office, it amounts to a confession of the usurpation, though he denies it, and the court will give judgment against him. *Rex v. Phillips*, M. 7 G. Str. 394.

If the plea makes the place where the bail-bond was given material, it is naught, and there shall be judgment for the plaintiff. *Belgardine v. Preston*, P. 8 G. Fort. 365.

If plaintiff in an action on a bail-bond, sets out that the bond was to appear at the return of the writ, and defendant pleads the stat. H. 6., and says it was a bond made for ease and favour; it is a bad plea, for he ought to have traversed the condition set out by plaintiff; and here are only two affirmatives, which cannot make an issue. *Peedle v. Christmas*, P. 12 G. Fort. 365. Vide Doug. 94., a similar case.

So, if the plea is bad, and issue found thereon for the plaintiff, there shall be judgment against the defendant, though it does not appear that he is chargeable; as, in debt against an executor, who pleads another judgment at a day to come, and issue, that it was *per fraudem*, is found for the plaintiff, though it be impossible, yet the plaintiff shall have judgment. R. Cro. Car. 25.

If a defendant pleads a justification insufficient in law, upon which issue is taken, and the issue found for him, the court will give the plaintiff leave to enter up judgment, notwithstanding the justification. 1 T. R. 118.

So, if the defendant by his avowry destroys the plaintiff's title, but gives him another title, there shall be judgment for the plaintiff; for upon the whole record it appears the plaintiff has title. R. 8 Co. 93. a.

So, if the defendant pleads a good plea in bar, but the plaintiff avoids it by his replication, there shall be judgment for the plaintiff. R. Lut. 1380.

If matter that ought to have been pleaded in abatement is pleaded in bar, it is bad. *White v. Willes*, P. 32 G. 2. 2 Wils. 87.

So, if executor sued as administrator, pleads his being executor in bar, and not in abatement, and plaintiff demurs, plaintiff shall have judgment. *Stocker v. Heath*, P. 8 G. 2. B. R. H. 104.

In trespass for impounding a mare, if the defendant justifies for that the mare was mangy, it must allege that she was so when put in, or that plaintiff had notice of it before the distress, or it is bad. Semb. *Palmer v. Stone*, T. 32 & 33 G. 2. 2 Wils. 96.

To trespass for entering close, treading down the grass there, and eating other grass with cattle; if defendant pleads not guilty to the whole, and as to entering and treading, justifies on two prescriptions, and there is a verdict for plaintiff on the



general issue, and for defendant on the other; plaintiff shall have judgment; for eating the grass is not covered by the justifications. *Knight v. Lillo*, T. 31 G. 2. 2 Wils. 81.

[\*](M 3.) Upon a bad replication.

But, if the plaintiff does not demur to the defendant's defective plea, but replies, and by his replication shows that he has no cause of action, there shall be judgment against the plaintiff; as, in debt on a bond, if the defendant pleads performance, and the plaintiff assigns an insufficient breach, there shall be judgment against him, though the plea was defective. R. 2 Cro. 133. 8 Co. 133. b. R. Lut. 609. R. Hob. 14.

So, in an action for an escape, if the bar is defective, but the replication shows no cause of action, there shall be judgment against the plaintiff. R. 3 Co. 52. b. R. 8 Co. 120. b. R. 8 Co. 133. b. Poph. 41, 42.

So, in ejectment. R. Hob. 128.

And where the replication shows that the plaintiff has no cause of action, it shall not be aided by a rejoinder which tenders issue upon another point, and admits a cause of action. 1 Lev. 195.

Yet, where the replication is imperfect or defective in the manner of pleading, it shall be aided by a rejoinder, which admits the thing mispleaded, and tenders issue on another point. R. 1 Lev. 195.

If there is a bad replication, of which the defendant gives notice, and plaintiff goes on to trial, and has verdict without defence, it shall be set aside. *Barnes*, 457.

If upon the whole record it appears that the plaintiff has no right to sue whether from a personal disability or otherwise, however formal his adversary's defence, the court are bound, *ex officio*, to give judgment against him; as, where it is admitted, that he has become an alien enemy since action brought, and before plea pleaded. 4 East, 502.

Rule, that judgment shall not be signed for nonpayment of the issue money. K. B. Hil. 35 Geo. 3. 6 T. R. 218. C. B. Hil. 35 Geo. 3. 2 II. Bl. 551.; and the rule is without an exception. 6 T. R. 477.

The rule of court, 5 Ann. "that the defendant's attorney, at the time of the delivery of the copy of the declaration, or taking thereof out of the office, shall pay fourpence for the warrant of attorney; and if he refuse, the plaintiff's attorney may sign judgment by default," is obsolete. 4 T. R. 370.

Judgment cannot be signed for nonpayment of the judge's paper books. 1 B. & P. 292.

(M 4.) At what time judgment shall be given or signed.

Plaintiff is not obliged to proceed to final judgment next term after trial; therefore if verdict in Hil. vac. defendant renders himself in Easter, and plaintiff might have signed final judgment, but does it not till Trinity, and in Michaelmas charges defendant in execution, it is well, and defendant is not entitled to *supersedeas*. *Pierce v. ———*, H. 24 G. 2. 1 Wils. 297.

So, if a cause rests four terms, without any proceeding, judgment shall not be signed without a term's notice. Mod. Ca. 18.

So, judgment shall not be signed after a verdict or writ of inquiry, till four days exclusive. R. 1 Sal. 399.

The rule, that final judgment cannot be signed till four days after the return of the *habeas corpora juratorum*, does not hold where the term closes before their expiration. 2 B. & P. 393.

If a plaintiff, entitled to sign judgment, is required to give security for costs, with

a stay of proceedings until given, he cannot sign judgment before [\*]the opening of the office on the day following that on which he gives it. 3 B. & P. 319.

In all cases where the plaintiff, having filed common bail for the defendant between the 2d and 6th November, is entitled to judgment, it is signed as of the day before the essoign day (3d November,) of Michaelmas term. 5 T. R. 65.

In a four-day rule for judgment, neither the first nor last day, nor an intervening Sunday, counts. 13 East, 21.

The court will give leave in the first instance to enter up judgment on a verdict reduced by an award. *Higginson v. Nesbit*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. 97.

So, there cannot be final judgment in real or mixt actions without a peremptory rule on motion. R. 1 Sal. 399.

On a rule for plaintiff's attorney to bring in the roll, it cannot be delivered by the counsel to the clerk of the papers; the attorney must file it himself. *Whiter v. Groombridge*, P. 8 G. 2. B. R. H. 104.

The court will not order plaintiff's attorney to bring in and enter up judgment, on the motion of a stranger, though in order that it may be used as evidence on a penal statute. *Hudson v. Smith*, M. 11 G. 2. Andr. 22.

But in personal actions, judgment may be signed without motion. 1 Sal. 399.

Where a verdict is taken subject to a reference, judgment may be entered for the sum awarded, without applying to the court. 1 East, 401. 3 B. & P. 244.

Where a verdict has been taken for the plaintiff, subject to an award, he cannot sign judgment for the sum awarded, without first obtaining a rule for that purpose. 4 East, 309.

The motion to enter up judgment on a verdict reduced by an award, is of course. 1 B. & P. 97.

Where an award reducing a verdict directs payment at a future day, semble, that judgment cannot be entered, and clearly execution cannot issue before the day. 4 Taunt. 319.

Judgment may be entered pursuant to an award, under a reference, which has been lost, on affidavit of its contents. 3 Taunt. 45.

The judgment in cases argued and determined at Serjeant's Inn Hall, cannot be given till the subsequent term. 7 Taunt. 192.

So, in real actions on a plea in abatement. Ibid.

So, if the plaintiff does not enter up judgment after verdict for him, because the damages are small, the defendant may. Hard. 219.

So, if the defendant dies after the verdict, and before judgment signed, judgment may be signed within two terms after. 1 Sal. 401.

If plaintiff (in an action for arrears) dies before judgment on a special verdict, judgment may be entered as of the term in which the *postea* is returnable. *Trelawney v. Winchester*, H. 30 G. 2. 1 B. M. 219.

On a case reserved for the consideration of the court, if defendant dies pending the argument, judgment shall be entered *nunc pro tunc*. *Astley v. Reynolds*, M. 5 Geo. 2. Str. 159.

If defendant dies after judgment pronounced for him, the court will give leave to enter it up as of that term, though the application is six or seven terms after. *Norwich v. Berry*, H. 9 Geo. 3. 4 B. M. 2277.

If an executor receive assets between the time of the plaintiff's suing out the writ, and the judgment *quando accederent*, upon *plene administravit* pleaded, the court will permit the plaintiff, in his *scire facias*, to amend his judgment as to the time, by making it a judgment as of that term, when he could, at the soonest, have entered it up, unless the defendant can show, that in point of fact some injustice will be done by it in the particular case. *Mara v. Quin*, B. R. M. 35 Geo. 3. 6 T. R. 1.

[\*]If defendant in error dies pending a *cur. advisare vult*, the court will give leave to enter judgment *nunc pro tunc*. *Cumber v. Wane*, P. 7 G. Str. 426.

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If judgment be signed or pronounced in any term, it may be entered upon a roll of the same term, at any time before the essoign day of the next term. Mod. Ca. 191.

So, if judgment be pronounced, and the roll not engrossed, it may be done many years after by leave of the court. Mod. Ca. 59.

Though it be a judgment in error on an indictment for treason, &c. R. Mod. Ca. 59.

The court will not give leave to enter up a judgment of twenty years standing, *nunc pro tunc*. Flower v. Earl Bolinbroke, M. 12 Geo. Str. 639.

It is only permitted to enter judgment *nunc pro tunc*, where the delay has proceeded from the act of the court. If this rule is to be extended, it can only be where the delay having been occasioned by the party as being frivolous; not where his proceeding has been according to the common course of law. 1 T. R. 637.

After verdict, and the death of one party, and more than two terms elapsed since the verdict, judgment cannot be entered *nunc pro tunc*. 4 Taunt. 702.

Judgment may be signed after the defendant's death, if it has relation back to his lifetime; thus it may be signed in Easter vacation, on a warrant of attorney, where the defendant died in Easter term. 6 T. R. 368.

Judgment in actions by bill, in the king's bench, relate not to the essoign, but to the first day in full term. And since judgment cannot be entered against a party after his death, unless as of a day when he was living, it follows that to obtain leave to enter up judgment on an old warrant of attorney, the affidavit in support of the application, must state that the defendant was alive on the first or other day in full term of the term in which the application is made. 4 M. & S. 174.

Judgment may be entered up for a defendant, as of a term when pronounced when he was alive, though he be since dead. 4 Burr. 2277.

Where ultimately, a nonsuit is entered on a point reserved at the trial, it has relation back to the trial, so as to warrant the entering of judgment for the defendant deceased, as of the term following. 1 Taunt. 385.

Yet the court may stay it by rule till the cause is examined. Mod. Ca. 59.

And the court do not give leave to enter it of a precedent term, but it shall be continued till the present term. Mod. Ca. 184. 191.

If no fraud appears in plaintiff, but the judgment has not been docketted in due time by negligence, the court will not interpose to set aside judgment on motion. Barnes, 261.

By rule of C. B. E. 12 G. 2. it is ordered, that after the first day of the then next term, all postea's and inquisitions, on which final judgments are signed, shall be left with the prothonotaries, in order that the judgments may be immediately entered. Barnes, 259.

By rule of B. R. & C. P. H. 35 G. 3. it is ordered, that after the first day of the next term no judgment shall be signed for nonpayment of issue money; but that it shall remain to be taxed as part of the costs in the cause. 6 T. R. 218. 2 H. Bl. Fuller v. Osborne, B. R. M. 36 G. 3. 6 T. R. 477. Vide supra, (E. 42.)

The court will not allow a plaintiff to sign judgment because the defendant refuses to pay for half the paper-books delivered to the judges, the case being within the above rule. Fulham v. Bagshaw, C. P. T. 38 Geo. 3. 1 Bos. & Pul. 292.

A judgment entered up by an attorney's clerk in the name of the attorney, without his knowledge, is irregular. 5 Burr. 2660.

[\*] Semble, that any person interested in a judgment may compel the party to enter it up. 2 N. R. 474.

Action on a judgment may be stayed, on payment of the sum recovered, and costs, without any interest, although the defendant absconded for seven years since the judgment. 2 Anst. 558.

The court of exchequer will not set aside a judgment regularly entered up, on the ground of usury or extortion in obtaining it. 1 Anst. 7.

To set aside a verdict and judgment, as obtained by the attorney, without the leave of the client, which must, therefore, be produced. 1 Anst. 271.

An application to set aside a judgment must be made without delay. 3 T. R. 301.

A rule for setting aside a judgment on the merits cannot be resisted, on the ground that the defendant means to plead bankruptcy. 1 B. & P. 52.

On setting aside judgment for want of a plea, the plea of the statute of limitations will not be excluded. 1 B. & P. 228.

The court will set aside a regular interlocutory judgment, on affidavit of merits, though it be the defendant's intention to plead his infancy. 1 Mars. 391. 5 Taunt. 856.

A regular judgment will not be set aside, where the defendant had refused fair terms of compromise. 4 Taunt. 885.

Where judgment has been given for the defendant, on demurrer to a plea, the court will not in a subsequent term set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets *quando acciderint*. 1 Mars. 401. 5 Taunt. 333. 665. 6 Taunt. 45.

### (N) PROTESTATION.

A protestation is made to the intent that the defendant or plaintiff may not be concluded by his plea or replication, if the issue be found for him. Co. Lit. 124. b. Pl. Com. 276. b.

As, in an action by a villein against his lord, who pleads in bar, he must at the beginning of his plea make protestation that he is his villein, otherwise the plaintiff shall be enfranchised, though the issue be found for the lord. Lit. sect. 192, 193.

And a man may plead it in abatement, or take it by protestation and plead over. Lit. s. 193.

So, a man may take a protestation in his replication; as, in *assumpsit*, if the defendant pleads an agreement to take a bill in satisfaction, the plaintiff may say, *protestando* that there was no agreement and no bill given that it, was not sealed. R. 5 Mod. 136.

So, a man may take by protestation matter which he cannot plead; as, in a *precipe in capite*, the tenant cannot plead that the land is holden of B. and not of the king, but shall make protestation of it.

In an action for taking goods of the value of 5*l.* the defendant may make protestation that they were not of more than the value of 3*s.* 4*d.* Lut. 1320.

On an information, the defendant shall take by protestation, that it is a *minus sufficiens*. P. Com. 1. a.

The protestation must come after *præcludi, non, &c.* and not before. Pl. Com. 276. b.

But a protestation, repugnant or inconsistent with the plea, is not good; as, in replevin, for a taking in A. a protestation that he did not take, and a plea that there is no such vill as A. with an avowry by *retorn. habendo*, is bad. Bro. Protestation, 1.

So, if the defendant pleads a descent, which tolls entry, and the plaintiff *protestando* that there was no descent, pleads continual claim; [\*]for he does not acknowledge the descent by the protestation, and confesses and avoids it by plea. Bro. Protestation, 5.

In an action by an executor, the defendant ought not to take by protestation, that the plaintiff was not executor, and plead that A. was administrator, who gave to him; for it is the effect of the plea, that the plaintiff was not executor. R. Pl. Com. 276. b.

In *mayhem*, if the defendant *protestando* that it was *de son assault*, pleads *nul mayhem*. Kel. 95. a.

Nor, an idle and superfluous protestation; as, in action by the executor of A., if the defendant makes protestation that A. did not make a will, and that A. did not make the plaintiff executor; for if he made no will, the other part is included. Pl. Com. 276. b.

Yet, an idle or repugnant protestation does not vitiate the plea, though it be shown for cause of demurrer; for the intent of a protestation is, that the party may not be concluded in another action. R. in B. R. inter Sir G. Warberton and ———. R. by C. B. M. 9 Ann.

The protestation does not avail, if the issue be against him; as, if an issue is found against a lord, the villein shall be enfranchised, though he takes protestation, that he is his villein. Co. Lit. 126. a.

Yet, if the vouchee takes by protestation the value of the land, and enters into warranty; though it is found against him, the protestation prevents a conclusion as to the value of the land. Co. Lit. 126. a.

### (O) SHOWING OF DEEDS.

#### (O 1.) When it shall be.

In all actions, a man, who claims by deed, and pleads it, ought to say *hic in curia prolat*. if he is a party to the deed, for by the showing of deeds in court, the court are to judge whether they are good. R. 10 Co. 92. a. Co. Lit. 35. b. R. 2 Cro. 272. Yel. 201.

And therefore, if a man claims a villein, or any other thing which he cannot have without deed, he ought to show the deed in court. Lit. s. 183.

So, if a man alleges an estate of freehold to be on condition, he must show a deed thereof. Lit. s. 365.

#### (O 2.) How pleaded.

If a man pleads a deed, he ought regularly to allege a *profert* of the deed itself.

Or, of the record.

And the printed act is not sufficient, if he makes a *profert* of an act of parliament in plea. R. Sal. 566.

But by the st. 3 & 4 Ed. 6.—4 & 13 El. 6. the exemplification or *constat* of inrolment of letters patent, pleaded or showed, shall be of like effect as the first letters patent, if the same had been pleaded or shown.

And therefore it is sufficient to say, *prout per exempl. inrotulament*. 1 Sand. 189. Sal. 566.

So, by the st. 10 Ann. 18. a copy of the inrolment of any indenture of bargain and sale enrolled.

But if he pleads an inrolment, he need not say before whom the deed was acknowledged. R. Pl. Com. 105. a.

[\*]And if the inrolment be not effectual, the other party may traverse the inrolment, and it shall be tried by the record. R. Pl. Com. 105. a.

In debt on assignment of bail bond, *profert* of the bond is enough, without setting down the witnesses' names. Robinson v. Taylor, T. 18 G. Fort. 360.

#### (O 3.) What deed.

So, if a man pleads letters patent to him, or to another, to whom he is



privy, or under whom he justifies, he ought to show them to the court. 10 Co. 92. Mo. 849. Dy. 29. b.

So, in debt upon bond, he must show the bond.

So, where an action is founded on a deed, he must show the deed ; as, covenant, &c.

And he must show the original ; for a counterpart is not sufficient. R. Noy, 53.

{ But it seems, that a copy may be given in evidence, where the original is lost. Taylor's Adx. v. Peyton's Adx. 1 Wash. 252. }

So, in an action upon the case for the profits of an office, he must show the letters patent of the office. Per two J. Latch. 88.

So, in debt by an executor, he must show to the court the letters testamentary. R. Hob. 53. Cont. if not demanded. 1 Rol. 78. Vide post. (O 16.)

If the defendant prays oyer of the letters testamentary, it is sufficient if the executor produces an exemplification of the probate. Shepherd v. Shorthose, H. 7 G. Str. 412.

So, if he pleads payment with an acquittance, he must show the acquittance. R. Sal. 519.

But he need not show to the court a writing not sealed ; as, if he pleads a warrant of a justice of the peace, he need not say *hic in curia prolat.* R. 3 Lev. 205.

So, if he pleads a sheriff's warrant. D. 3 Lev. 205. 2 Cro. 372.

Or, an award ; for it is no deed. Sti. 459. { Weed v. Ellis, 3 Caines' Rep. 253. } Vide Arbitrament (I.)

Or, a policy of insurance. 1 Sid. 386.

Plaintiff is not obliged to show a promissory note or bill of exchange, on motion. Odiarne v. Duke of Grafton, M. 1727, Bunb. 243.

So, though it be under seal, if it be not a deed ; as, a composition with creditors on the stat. 8 (or 8 & 9) W. 3. 18. R. Mod. Ca. 58. Vide Ld. Raym. 967.

#### (O 4.) Where one is privy.

So, a man who claims any estate or interest by a deed must show the deed, though he is no party to it. 10 Co. 92. a. Co. Lit. 226. a.

As, if there be a release of a right to tenant for life or in tail, he in reversion or remainder, who pleads it, must show the deed. Lit. s. 453.

Or, if it be to him in reversion or remainder, if the tenant for life pleads it, he must have it in his hands. Lit. s. 452.

So, if a confirmation be to tenant for life, remainder to A., he shall not have waste or other benefit by such remainder, without showing the deed. Lit. s. 573.

So, if the defendant, being a tinner, pleads a privilege granted by charter of Ed. 1. to tanners, not to be sued out of the stannaries, he ought to show the patent, for he is privy to it. R. Mo. 849.

#### [\*](O 5.) Or, claims only part of the estate.

Though he has only part of the estate, which was granted by the original deed ; as, if an estate be granted by letters patent, the lessee of part must in pleading show the letters patent. R. 10 Co. 92. a. Dub. Dy. 29. b. Semb. cont. 2 Cro. 70.

So, if the grantee of a rent grant part of the rent to another, the second grantee ought to show the first deed. 3 H. 6. 20, 21. 10 Co. 93. a.

## (O 6.) Or, justifies under a party or privy.

If a man justifies under one who is party or privy to a deed, in pleading he must show the deed. 10 Co. 92. a. Co. Lit. 226. a.

As, if he justifies as servant to the lessee of a patentee. R. 10 Co. 92. a. 2 Cro. 317.

Or, to a lessee, who by a covenant in his lease has power to take trees for fireboot. R. 2 Cro. 292.

Or, as servant to a lessee of tithes. R. 2 Cro. 360.

## (O 7.) Though nothing is conveyed by the deed, if a deed was necessary.

And if a deed is necessary, he who pleads it must show it, though nothing is conveyed or transferred by the deed, but it relates to collateral matter ; as, if a man pleads attornment by a corporation to a grant to him in reversion, he must show the deed of attornment, though he claims nothing from those who attorned, which is only a consent. 6 Co. 38. b.

## (O 8.) When it is not necessary :—If he be a stranger.

But if a man be a stranger to the deed, and claims nothing out of it, nor justifies as a servant to one who is party or privy, he need not show the deed, though he pleads it. 10 Co. 93, 94.

As, if he comes in not by the party to the deed, but by act of law, and therefore cannot provide for the showing of the deed : as, if guardian in chivalry in right of the heir enters for a condition broken, he need not show a deed of the condition. Co. Lit. 225. b.

So, tenant by statute merchant, staple, *elegit*. Co. Lit. 225. b. 5 Co. 75. a.

So, tenant in dower. Co. Lit. 225. b.

If a minister sues for an augmentation on the st. 29 Car. 2. reserved by a dean on a demise by indenture of lands belonging to his deanry, he need not show the indenture, for it is sufficient to say *penes se remanen*. R. 3 Lev. 83.

A bailiff, who justifies under a justice of peace, need not show the commission. 20 H. 7. 7. a.

Nor, a man who pleads a patent to a stranger. R. Hard. 187.

Nor, *cestuy que use*, who pleads a grant of an advowson by a deed to B. to his use ; for the deed belongs to B. R. 2 Cro. 217.

So, an assignee of a debt upon bond by commissioners of bankrupt ; for he comes to it by act of law, and therefore need not show the bond. R. Cro. Car. 209.

[\*]So, if there be a covenant to stand seised to the use of B., he who claims under B. need not show the deed of covenant in pleading ; for B. is in by law, viz. by the st. 28 H. 8. 10. of uses. Semb. Cro. Car. 442.

A *profert* is not necessary of a conveyance deriving its effect from the statute of uses. Dy. 277. Cro. Jac. 217. Carth. 316. 3 T. R. 156. Bolton v. Carlisle. C. P. M. 34 Geo. 3. 2 H. Bl. 262.

In a conveyance by feoffment, the statute of frauds requires that livery should be accompanied by an instrument in writing ; yet the party is not bound to make a *profert* of the deed. Read v. Brookman, B. R. E. 39 Geo. 3. 3 T. R. 156.

In a plea of justification under process of an inferior court erected by letters patent ; it is not necessary to make a *profert* of the letters patent. Titley v. Foxall, C. P. T. 81 & 82 Geo. 2. Willes, 688.

So, an executor of a feoffee need not produce the deed by which the plaintiff enfeoffed B. to the use of the testator, in debt on a bond for performance of a covenant of the same deed. R. Lut. 483.

If plaintiff claims not the land but only a rent-charge, *proferit* is not necessary; for the charters belong to the owner of the land, and the owner of the rent-charge is not entitled to them. *Whitfield v. Fausset*, H. 1749, 1 Ves. 387.

(O 9.) Except where the deed belongs to him.

Yet, if the deed belongs to him, he must show it, though he came to the estate by act of law; as, the lord by escheat shall not plead a condition to defeat a freehold without showing it. Co. Litt. 226. a.

So, tenant by the curtesy shall not plead a condition made by his wife, though he is in by act of law; for it is presumed that he has the deeds which belonged to his wife. Co. Litt. 226. a.

So, if the uncle of a tenant in tail enfeoffs another with warranty, who afterwards releases the warranty to the feoffor, and the uncle dies, if the tenant in tail pleads the release, he must show it; for it belongs to him after the death of his uncle. Co. Litt. 393. a.

(O 10.) If the estate be executed.

So, a man who pleads a deed to which he is neither party nor privy, need not show it, if the estate be executed; as, if he pleads a feoffment to A. upon a condition and entry for the condition broken, and afterwards a descent to the defendant, he need not show the deed of condition; for it is executed. Co. Lit. 226. a.

So, if he pleads a mortgage and payment at the day, he need not show the deed; for the condition being performed, the deed perhaps was delivered up. Ibid.

So, if a mortgagee demises for years, and the mortgagor re-enters in debt for rent against the lessee afterwards, he shall plead the mortgage and re-entry, without showing the deed. Ibid.

So, if a confirmation be to a lessee for life, remainder to A. in waste, &c. by A., after the estate executed, he need not show the deed. Co. Lit. 317. b.

So, if defendant pleads an assignment of a lease, the plaintiff replies that the lessee could not assign without the lessor's license by deed, and the defendant rejoins that he had license by deed, he need not show it; for it is executed. R. 6 Co. 38. b. R. 2 Cro. 102.

[\*](O 11.) Except where he is party or privy.

But a party or a privy to a deed must show it, though the estate be executed; as, the lessor himself cannot plead a condition and entry for the condition broken, without showing the deed, though the condition be executed. Co. Lit. 227. b. 228. b.

(O 12.) If the showing be hindered, or the deed admitted by the other party.

So, if the plaintiff detains the deed, the defendant may plead without showing it; as, tenant in an assize may plead a feoffment on condition and entry, and that the plaintiff entered and took the chest where the deed was, &c., and detains it without showing the deed. Co. Lit. 226. a.

So, in waste, the defendant may plead a release, and that the plaintiff got possession of it, and detains it without showing the release. 5 Co. 75. a.

So, the plaintiff may declare that by indenture, which the defendant *penes se retinet*, A. demised the rectory to the defendant, who thereby covenanted to find a priest, and to pay him 20*l.* per ann., and that the plaintiff was found, and now brings debt for the 20*l.*, without a *profert in cur.*; for neither the indenture nor counterpart belong to him. R. 3 Lev. 83. a.

Where an administrator is properly sued in that character, without annexing to his plea a *profert* of the letters of administration; thus, to a plea of retainer; since, as he cannot be an administrator by wrong, the declaration admits that he is so by right. 6 T. R. 550,

### (O 13.) Or, be impossible.

So, if a deed be shown in court, and denied, for which reason it remains in court, it may be pleaded in another court without showing it. 5 Co. 74. b.

So, a deed may be pleaded as lost by time and accident, without *profert*. 3 T. R. 151. 4 T. R. 323. < *Respublica v. Coates*, 1 Yeates, 2. >

Where, in setting forth a conveyance it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost, with a *profert* of the residue; it was holden to be good pleading. *Bolton v. Carlisle*, C. P. M. 34 G. 3. 2 H. Bl. 259.

So, if letters patent, which are in their nature matters of record, are of record in the same court, they may be pleaded without showing. 5 Co. 74. b. Sal. 497.

Otherwise, if in its nature not matter of record; for a deed enrolled in the same court cannot be pleaded without showing. 5 Co. 74. b.

So, there ought to be a *profert* of letters patent enrolled in another court, or of an exemplification thereof. Sal. 497.

### (O 14.) If the deed was not necessary, or conveyed nothing.

So, if there be a deed, when it was not necessary, whereby no estate or interest is conveyed, a man, who pleads it, need not show it to the court; as, if a lease be on condition that he will not assign without license, and the lessee pleads a license by deed, he need not show the deed; for there is nothing conveyed by it, and a license without deed would have been sufficient. R. 6 Co. 38.

[\*]So, if the condition be, that he will not assign without deed, and he pleads an assignment by deed, he need not show the deed; for a deed was not necessary *ex provisione legis*, but only *ex provisione hominis*. 6 Co. 38. b.

So, in debt for rent upon a lease by indenture, the plaintiff need not show it; for the lease is the foundation of the action, and it need not be by indenture. Per two J. Cro. El. 711. 6 Co. 38. b. in marg.

In *quare impedit*, if the plaintiff makes title by a grant of the next avoidance to A., who made executors, who granted to him, he need not show the letters testamentary; for the grant to the plaintiff was good, though the will was not proved. R. Dy. 135. a.

### (O 15.) Or, be alleged in the inducement to the action or bar.

So, if the deed pleaded be only in the inducement to the action or bar, it need not be shown to the court; as, in a suit in the exchequer by the king's farmer, he need not show the deed whereby he is farmer; for it is collateral

to the action. 6 Co. 38. b. Banfill v. Leigh, B. R. E, 40 G. 3. 8 T. R. 571.

So, in an action on the st. 2 Ed. 6. 13. If the plaintiff declares that the king granted tithes by letters patent to A. for life, who leased to the plaintiff for years, he need not show to the court the letters patents, which are only conveyance to the action. R. 2 Cro. 70.

So, in an action for disturbance of a way, if the plaintiff declares that a corporation, and all *que* estate, &c. in such a messuage, have a way, he need not show the deed whereby the estate was conveyed to the corporation; for it is only inducement. R. 2 Cro. 673.

So, in replevin, if the avowant claims by a *que* estate a hundred to which a leet is incident, he need not show the deed whereby the hundred is claimed; for this is only inducement to the leet. 2 Leo. 74.

So, in trespass, if the defendant justifies by command of the heir of A., who died seised, and the land descended to his heir, and the plaintiff says that A. by indenture covenanted to stand seised to the use of B., &c. and by his license, &c. and traverses the dying seised, he need not show the indenture; for it is only inducement to the traverse. R. Cro. Car. 442. Jon. 377.

So, in trespass, if the defendant justifies by A.'s dying seised, and a descent to him, and the plaintiff shows that before A. was seised, B. being seised made a lease to D., who died, and plaintiff's wife took out administration and traverses A.'s dying seised, there is no need of a *profert* of the letters of administration to his wife; for it was only inducement to the traverse. R. Hob. 38.

An executor's or administrator's unnecessarily declaring as such, is surplusage, and therefore no *profert* is required. Dougl. 4.

(O 16.) If the deed be not mentioned, to entitle him.

So, if a man pleads a deed by way of discharge, and not in order to make a title, he need not show it to the court; as, in bar to an avowry made by a corporation for rent and services, if the plaintiff pleads a lease of the manor made to A. who demised to him, he need not show the deed; for it is pleaded by way of discharge, and he does not claim title by it. R. Mo. 870.

[\*]So, in an action against an administrator, if the defendant pleads original purchased before administration granted to him, he need not show the letters of administration; for he doth not entitle himself by them. R. Lut. 10.

In an action by an executor, if the defendant pleads administration granted to another, he need not show the letters of administration. R. Pl. Com. 277. a.

If there be a grant to the lord of a manor that the tenants of the manor shall be discharged of toll, and a tenant pleads such discharge, he need not show the grant. 20 H. 7. 6. b. Cont. per Brudnel, 20 H. 7. 7. a.

So, in a writ, founded on a deed, the deed need not be shown.

So, also, in a *scire facias* by an administrator, or executor, upon a recognizance to his testator, he need not show the letters testamentary. R. Cro. El. 592.

(O 17.) When the not showing is aided.

If a man did not show a deed to the court, when he ought, the omission



was esteemed matter of substance, and not helped upon a general demurrer. Dub. 1 Leo. 310. R. 2 Cro. 292. R. 10 Co. 94. D. 1 Rol. 20. D. Hob. 233. R. 2 Cro. 32. R. cont. Sal. 497. D. cont. 1 Leo. 300. Cro. El. 153. Acc. Mo. 885.

But now it is aided on a general demurrer. R. Lut. 1355.; and by the st. 4 & 5 Ann. 16. it is enacted that no exception shall be taken for not alleging the bringing into court any bond, indenture, or other deed, unless shown for cause of demurrer.

So, an omission of *profert hic in cur. literas testamentar.* in an action by an executor, was substance, and not aided on a general demurrer. R. Hob. 83. R. 2 Cro. 409. 412. 3 Bul. 223. R. Cro. El. 551.

But now it shall be aided. R. 2 Sand. 502. R. 1 Sid. 249. R. Lut. 301.; and it is so enacted by the st. 4 & 5 Ann. 16.

So, the omission of letters of administration was held to be substance. Hob. 233.

But now it shall be aided on general demurrer. R. 1 Vent. 222. 1 Sid. 98.; and it is so enacted by the st. 4 & 5 Ann. 16.

And by the st. 16 & 17 Car. 2. 8. after verdict, no judgment shall be staid or reversed for want of alleging the bringing into court of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or letters testamentary, or letters of administration.

So, if the declaration alleged matter of record, and did not conclude *prout patet per recordum*, it was substance.

But now it shall be aided on a general demurrer. R. 1 Mod. 9. Vide st. 4 & 5 Ann. 16. Vide ante, (E 29.)

The loss of deed by time and accident, or by any other casualty, is a sufficient reason for dispensing with a *profert* in pleading. As is likewise the circumstance, that the deed is in the hands of the opposite party, or destroyed by him. 8 T. R. 151.

If a *profert* is excused, the matter of excuse is put in issue, either by a specific traverse of the facts, or by pleading *non est factum*. Ibid. 158.

If a party, instead of pleading a deed has lost or destroyed, inadvertently pleads with a *profert*, and his adversary pleads *non est factum*, he will not be allowed to prove the loss at the trial. 4 East, 585.

{ In debt upon a bill of exchange, the omission to make a *profert*, is cured by verdict. *Holt v. Atkinson's Exr.* 2 Wash. 143. }

### [\*](P) OYER.

#### (P 1.) Of deeds.

If a man *profert in cur.* a deed, it remains in court, in judgment of law, the whole term, in which it is shown; for the whole term is but one day. R. 5 Co. 74. Wymark. Co. Lit. 231. b. Lut. 1644. Sal. 497.

And if the deed be denied, it remains in court till the plea is determined, and the *custos brevium* has the custody of it. 5 Co. 74. b. Co. Lit. 231. b. Mod. Ca. 233.

But if it be not denied after the end of the term in which it was shown, the law adjudges it to be in the custody of the party himself; for there is no officer in court to whom the charge of it belongs. 5 Co. 74. b. Co. Lit. 231. b. Sal. 497.

So, letters testamentary or of administration do not remain in court *omnino*; for they may be necessary elsewhere. Sal. 497.

If a deed is brought into court by one party, the other may demand oyer  
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of it at any time whilst it remains in court, and take advantage of any proviso or clause in such deed. R. 5 Co. 74. b.

So, if a deed be brought into court by one tenant or defendant, the others may plead in bar any matter in such deed, without having it in hand. 5 Co. 74. b.

And therefore, though a deed be not denied, oyer of it may be demanded in the same term in C. B. as well as in B. R. Lut. 1644.

And by the course of B. R., oyer may be at any time before plea, though it cannot be in C. B. after term, or after an imparlance. *Terms de ley*. But it is said that it shall not be after imparlance to another term. 2 Lev. 142. Vide Bro. Oyer, 16, 17. 33. 39.

Oyer must be demanded before rule to plead is out. Barnes, 241. 329. 263. 326.

Oyer is demandable any time before the twenty-four hours after the demand of a plea are out, though the rule to the plea has expired. 2 B. & P. 379.

Oyer cannot be demanded in another term than that in which the plea is filed. Per Buller, J. 1 T. R. 149.

So, by the course of B. R., no imparlance or continuance is entered before replication, rejoinder, &c. though day be allowed for two or three terms, to reply, &c.; and then the replication, rejoinder, &c. being entered generally, may take advantage of the deed mentioned in the bar, &c.; for the whole shall be understood to be in the same term. R. 5 Co. 75. a. Wymark. Semb. Lane, 39.

If the defendant demands oyer of an obligation, he shall not have oyer of the condition, unless he demands that also. Mod. Ca. 237.

But if he demands oyer of an indenture, which refers to matter indorsed, it is not a complete oyer, if he has not oyer of the indorsement also. R. Mod. Ca. 237.

Oyer shall contain the names of the witnesses, and all memorandums on the bond. Barnes, 263. Willes, 288. S. C.

If there are two counts for the same debt on one policy of insurance, defendant cannot have oyer of two policies. B. R. H. 243.

If oyer be demanded of a deed shown in a plea, it becomes part of the plea. 1 Sand. 317.

[\*]So, if there be oyer of a deed shown in a declaration, it will be part of the declaration.

If oyer is granted of any instrument or record, and it is set forth, although the party was not entitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. Dougl. 476.

So, if the party has not the deed, which he shows in his declaration, &c., and oyer of it is demanded, the court on an affidavit, will oblige the other party to produce his counterpart, or will grant an imparlance. 2 Cro. 429. 1 Sid. 50.

And where an original lease was lost, the court, on application, has ordered that a copy of the counterpart should be deemed good oyer. By Buller J. Read v. Brookman, B. R. E. 29 Geo. 3. 3 T. R. 160.

So, if an action be founded on a writing, as a policy of assurance, where a *proferi* is not necessary, the court may grant an imparlance, till a sight given of the writing, if the defendant cannot have it otherwise. Semb. 1 Sid. 386.

Oyer of a deed, in covenant, cannot be dispensed with, though shown to be lost, and defendant have the other part in his hands. Sorseby v. Sparrow, P. 16 G. 2. Str. 1186. Wils. 16. Vide ante, (O 13.)

But where a note is only evidence of the action, the court will not direct a sight of it. R. 1 Sal. 215.

But a man cannot demand oyer of a deed, which is not in court; and therefore in debt upon a bond with a *profert in cur.*, if the defendant demands oyer of the bond and condition, which appears to be for the performance of the covenants in an indenture, he cannot demand oyer of the indenture; for it was not brought into court. R. 1 Sand. 9. 122. Sal. 498.

So, in debt on a recognizance, the defendant cannot demand oyer of it, if it was not acknowledged in the same court; for a recognizance in chancery or other court is not brought into court as a bond is. R. Poph. 202.

So, a party cannot demand oyer of an act of parliament, because it is not in the power of the court. Jeffrey v. White, B. R. M. 21 Geo. 3. Dougl. 476.

Nor, of letters patent, being a matter of record, unless there is an affidavit made that they are not enrolled. Rex v. Amery, H. 26 Geo. 3. 1 T. R. 149.

So, in a *scire facias*, on a recovery of an annuity by deed, the defendant cannot demand oyer; for the action is founded on the recovery, not on the deed. Bro. Oyer, 1. 32.

So, if the defendant justifies by a precept of a justice of peace, the plaintiff cannot demand oyer of the precept. Bro. Oyer, 13.

So, if the defendant demands oyer of a will, &c. whereof the plaintiff makes a *profert*, &c. when he need not, it shall not be allowed. Sal. 497.

So, if the defendant demands oyer of a deed, when it is not demandable, and the plaintiff gives oyer, he shall not be concluded thereby, but may afterwards make his oyer complete. R. Sal. 498.

If the defendant demand oyer, when it ought not to be granted, it is bad. Sal. 498.

But the plaintiff cannot in his demurrer say *quod placit. prædict. est minus sufficiens*. R. 2 Lev. 142.

[\*] And if a man demands oyer of a deed, not in court, it is bad on a special demurrer. R. 1 Sand. 9.

But it shall be aided on a general demurrer. Ibid.

So, if the defendant demands oyer of an indenture, not mentioned in the declaration, and the plaintiff gives it, the defendant may plead thereon. Mod. Ca. 237.

If a deed is pleaded with a *profert*, the other side is entitled to oyer; if, therefore, it has been pleaded so by mistake, the pleading must be amended; it being a general rule, that leave will not be granted, that the production of a copy shall be oyer. 3 T. R. 153.

If a man craves oyer of a deed shown in a declaration, which is granted, the other cannot say that the deed read is not the same on which he declared; for the reading is the act of the party himself, by which he is concluded. R. Lut. 1644.

If a party undertake to set out a deed on oyer, he must set forth the whole of it, recital and all; if he omit any part, either the court will quash the plea, or the other side may sign judgment. 4 T. R. 371.

Where there is any variance between the letters of administration set forth in the declaration, and the letters, &c. actually granted under the seal of the spiritual court; if the defendant will take advantage thereof, he must crave oyer thereof, before the rule to plead is out, must set the same out on record, and demur for the variance. 2 Wils. 413.

Otherwise if oyer is demanded of a writ, &c., he may say that it is not the same; for the reading is the act of the court. Per three J. Tracy cont. Lut. 1644.

So, if the defendant demands oyer of a deed, which is granted, and in his  
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plea recites the deed different from the true deed, the plaintiff by his replication may pray that the deed may be enrolled, and so procure it to be truly enrolled.

Defendant, after *oyer*, may plead the general issue, without taking notice of the *oyer*; and plaintiff cannot, when he makes up the issue, insert the *oyer* at the head of the pleas; if he would avail himself of it, he must pray it to be enrolled at the head of his replication at his own expense. Str. 1241. Willes, 288. n. (c).

In C. B., if *oyer* prayed and not pleaded, plaintiff may insert it in the plea; it is only where it is not prayed, that he is obliged to have it enrolled on his replication. Barnes, 327.

So, if the *oyer* be imperfect, but not varying from the deed, and the defendant demurs, he shall not take advantage of it; for he might insist upon a complete *oyer*. R. Sal. 602.

If defendant, after having craved *oyer* of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea; or the court will quash the plea. Wallace v. Cumberland, B. R. T. 31 Geo. 3. 4 T. R. 370.

If a bond is in the hands of a third person, the court will compel him to give *oyer* of it, and produce it at the trial; though he is a barrister, and alleges it was left in his hands to await the event of a suit depending; for defendant may avail himself of that by plea. White v. Montgomery, M. 17 G. 2. Str. 1198.

If defendant pleads with a *profert*, and *oyer* is demanded, plaintiff may sign judgment if it is not given in two days. Barnes, 245.

Two days, both exclusive, are allowed to give *oyer* in. 2 T. R. 40.

The party of whom *oyer* is demanded, must carry the copy of the instrument to the opposite party. 2 T. R. 40.

{ Though *profert* be made of a deed, yet if *oyer* be not prayed, the deed will not be a part of the record. Bender v. Fromberger, 4 Dall. 436. Vide Douglass v. Beam, 2 Binn. 76.

A variance between the declaration and bond in an action of debt, may be taken advantage of on demurrer, but is not a matter of error. Ibid.

So, in debt on an award, if there is a variance between the award as set forth in the count, and the *oyer*, the defendant must demur specially. James v. Walruth, 8 Johns. Rep. 320. 2d edit. >

### [\*](P 2.) Of writ and record.

So, a man may demand *oyer* of a writ or other record alleged in pleading: and therefore the defendant may demand *oyer* of the original.

The defendant is not entitled to *oyer* of the original, and if he pray *oyer*, the plaintiff may sign judgment without taking any notice of it. Dougl. 227.

And now *oyer* will not in general be granted of a record. 1 T. R. 150.

So, may the garnishee. Bro. Oyer, 11.

But shall not have *oyer* of mesne process: as, of re-summons on default, &c. Bro. Oyer, 3. 18.

So, in error, the defendant shall not have *oyer* of the original, but of the record he may have. Bro. Oyer, 19.

Nor, in attain. Ibid.

So, in a *scire facias* against an executor on a recovery, the defendant may demand *oyer* of the record. Bro. Oyer, 12. 26. 38.

So, in debt on a judgment. Semb. Bro. Oyer, 14. 26.

Plaintiff may have a rule to reject plea of a recovery in the same court, unless *oyer*. Hunter v. Wiseman, H. 2 G. 2. Gwinell v. Thompson, T. 3 G. 2. Str. 823.

But in debt on a recovery in an inferior court of record, the defendant shall not have *oyer* of the record; for it remains in the inferior court. Bro. Oyer, 8.

Nor, of a record in another court. Bro. Oyer, 26.

Or, after removal to another court by a *recordare*, error, &c. Bro. Oyer, 4. 31.

So, he shall not have oyer of a record, when it is only conveyance to the action; as in escape. Bro. Oyer, 29.

So, he shall not have oyer of a record, when he is a party to it. Bro. Oyer, 19, 31. 36.

If defendant pleads tender before original, and plaintiff replies original purchased before time of tender pleaded; the court will not make rule for oyer of original, which is a record. Barnes, 340.

So, in a *scire facias* on an office found for the king, the defendant shall not have oyer of the office; for it is recited in the writ. Bro. Oyer, 22.

The defendant shall not plead in abatement of the writ before oyer of it.

Nor, variance between the writ and count. R. Sal. 658.

If defendant pleads variance between writ and count, without oyer, he shall answer over. *Vanderplank v. Banks*, H. 32 G. 2. 2 Wils. 85.

After oyer, defendant may plead *nul tiel record*, without inserting the oyer; and plaintiff, if he pleases, may insert it in his replication. *Simmonds v. Parmenter*, T. 18 G. 2. Wils. 97.

So, the defendant shall not plead condition performed, before oyer of the bond. Bro. Oyer, 16. 25.

But the defendant shall not have oyer after imparlance. Bro. Oyer, 14: Per Holt, Mod. Ca. 28.

Nor, after plea in abatement. R. Mod. Ca. 28. Sal. 498.

Demand of oyer was anciently made in court; but now it is made by one attorney of the other. Mod. Ca. 28.

And when oyer ought to be granted, the defendant need not plead before oyer. *Ibid*.

[\*]But the defendant cannot take a copy of a writ from the record, to make oyer of it, without the plaintiff's consent; for it ought to be demanded of and granted by the other party. Mod. Ca. 28.

So, in covenant on an indenture, the defendant cannot, without demanding oyer, set out the indenture, and plead covenants performed. R. Mod. Ca. 154.

If oyer is granted, when it need not; it is no error. Mod. Ca. 28. Sal. 498.

And the party craving oyer shall be entitled to take the whole instrument as part of his adversary's plea. Dougl. 467.

Otherwise, if it be denied, when it ought to be granted. Mod. Ca. 28. Sal. 498.

The defendant has as many pleading days to plead after oyer is granted as he had when it was demanded. *Webber v. Austin*, B. R. M. 40 Geo. 3. 3 T. R. 356.

## (Q) DEMURRER.

### (Q 1.) What it is.

Demurrer is, when for the insufficiency of the count, plea, &c. in point of law, the other party demurs, and refers to the judgment of the court. Lit. 71. b. 5 Mod. 132.

If the plaintiff in his replication do not answer some matter contained in the plea, or answer it improperly, the defendant must demur to it. *Bullythorpe v. Turner*, C:

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P. B. 17 Geo. 2. Willes. 475. Barnes, 353. S. C. Coppin v. Carter, 1 T. R. 462. Theflusson v. Smith, 5 T. R. 152.

A discontinuance is a ground of demurrer. 1 B. & P. 411.

**(Q 2.) How it shall be delivered, &c.**

And in C. B. a demurrer to a plea, &c. need not be received, unless it is under a serjeant's hand. 3 Leo. 222. Comp. Att. 41.

But this does not extend to a demurrer on a challenge to an array. 3 Leo. 222.

If the joinder in demurrer is signed by counsel, at the time of accepting the paper-book, it is sufficient, though it was not signed when delivered. Barnes, 156.

A demurrer to an indictment shall not be received after verdict. R. 1 Sid. 208.

If a defect in pleading will not be aided by verdict, it is safer to join issue on the fact than to demur; for the fault in law will be considered afterwards. 4 Co. 14. a.

If there be a demurrer to part, and issue to part, the demurrer shall regularly be determined first. Co. Lit. 72. a.

Yet it is in the discretion of the court to try the issue before the demurrer is determined. Co. Lit. 72. a. Semb. Dal. 2.

But now, where issues are taken to some of the pleas, &c. and demurrers to others, the plaintiff has a right to argue the demurrers either before or after the trial, 2 T. R. 394.

If there be judgment for the plaintiff on a demurrer, he may, if he pleases, enter a *non pros.* on the issue, and have a writ of inquiry on the demurrer, but not without a *non pros.* to the issue. R. 1 Sal. 219.

On judgment for plaintiff, on demurrer to one count, he may execute writ of inquiry, without a *non pros.* to the issues, which he may supply when he enters final judgment. Fleming v. Langton, M. 9 G. Str. 532.

[\*] If there is judgment on demurrer as to one count, plaintiff may enter *nolle prosequi* as to the rest, and need not be amerced. Davis v. Hoyle, M. 10 G. Str. 574.

If one party demurs, the other must join in demurrer. Semb. Co. Lit. 72. a.

Or, amend or discontinue his action on payment of costs. Per rule, 1654. Mills, 29.

And if demurrer be joined, it cannot be waived afterwards without consent. R. Cro. Car. 513.

Yet, the king, if he pleases, may waive a demurrer; as, in an information by *qui tam*. Cro. Car. 347.

When demurrer is joined, the court shall adjudge upon the whole record, and not only on the point referred to the court by the demurrer. R. Hob. 56.

And if the defendant makes default at the day given after demurrer joined, there shall be final judgment against him. Mod. Ca. 5.

But, on a demurrer to a plea in abatement, the defendant cannot insist upon a defect in the declaration. Lut. 1592. 1667.

Yet, this does not extend to a plea in abatement, which may also be pleaded in bar. Semb. Lut. 1604.

It must be entered on the roll the term it is joined of. Barnes, 328.

After joinder, plaintiff tenders paper-book to defendant, if he refuses to accept and pay, judgment; if he accepts, plaintiff moves for *consilium*. Barnes, 163. 165.

Defendant may demur after issue tendered, and it may (on leave) be set down after paper-day. Barnes, 296.

After issue joined, demurrer cannot be received; therefore, though one record is averred by plaintiff, and another is denied by defendants, and so no proper issue joined, yet after issue, demurrer shall be set aside; and advantage must be taken of the impropriety in arrest of judgment. Barnes, 84.

Defendant may demur, if the replication does not offer a fair issue, and affords reasonable cause of demurrer, though he has had time to plead, on consenting to plead issuable plea, to rejoin *gratis*, and take short notice of trial. Dewey v. Sopp, P. 16 G. 2. Str. 1185.

Court will give leave to withdraw a demurrer, after it is set down to be argued and trial lost, on costs. Barnes, 155.

Though the court will sometimes give leave to withdraw a demurrer and plead, after demurrer argued, yet not after trial of other issues. Robinson v. Rayley, P. 30 G. 2. 1 B. M. 316.

### (Q 3.) The form of a demurrer.

If defendant demurs after issue joined upon *de injuria sua propria absque tali causa*, it is a discontinuance, and ill. Aslett v. Vincent, P. 13 G. Ld. Raym. 1482.

A demurrer ought to be to the whole plea, otherwise it is a discontinuance for the whole. Per Chamb. 2 Rol. 390. Vide Plea and Replication, ante, (E 1.—F 4.)

And therefore if the defendant pleads three pleas, and the plaintiff in his demurrer, says *quod placidum prædictum est minus sufficiens*, it is a discontinuance. R. Yel. 65.

So, in trespass for taking and carrying away goods, if the defendant *quoad* the taking demurs, and says nothing to the carrying away, it is a discontinuance. R. Yel. 5.

So, in trespass for taking and carrying away goods, if the defendant [\*]justifies, and the plaintiff *quoad placitum* to the taking the goods, and the matter therein demurs, and the defendant joins in this form *ex quo* the plaintiff acknowledges the taking *petit judicium*, without mention of the carrying away, it will be a discontinuance. R. 1 Brownl. 192. Yel. 5.

So, if a demurrer is to a replication to a plea in abatement, and prays that the writ may abate, and the plaintiff joins in demurrer, praying his damages; as, where the demurrer is to a plea in bar, it will be a discontinuance. R. Sho. 155.

After plea in abatement and replication, if defendant demurs and plaintiff joins, he must pray *respndreas ouster*, and not judgment and damages; but if he does, he may amend on payment of costs. Anon. P. 24 G. 2. 1 Wils. 302.

So, if the defendant pleads to part, and says nothing to the residue, and the plaintiff demurs, it is a discontinuance, for the demurrer shall not be intended to be for the not pleading to part; for the plaintiff ought to have prayed judgment on a *nil dicit*. R. 1 Rol. 488. l. 5.

But, if the defendant demurs to a *scire facias* or declaration, and concludes his demurrer in abatement, the plaintiff may join in bar and shall have judgment; for the matter being sufficient, and confessed by the demurrer, the defendant shall not avoid judgment by his conclusion. R. 3 Lev. 223.

If a count or declaration does not contain a good cause of action, there may be a demurrer to it.

If the declaration is founded on a bond or other specialty, the defendant may demand oyer of the specialty, and if it shows no cause of action, he may demur; for the deed on oyer is part of the count. Vide ante, (P 1.)

If declaration on recognizance of bail does not set out condition, defendant cannot demur; it may be absolute; if conditional, he should plead *nul tiel record*. Barnes, 839.

But if the defendant demand oyer of a bond, which appears to be made by many jointly, and thereupon he demurs, it is bad; for perhaps the others did not seal or execute the bond. R. Jon. 303.

So, if there are several counts in the same declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so much as is good. 1 Sand. 286. } Whitney v. Crosby, 3 Caines' Rep. 89. Vide Ward v. Sackrider, 3 Caines' Rep. 263. Adams v. Willoughby, 6 Johns. Rep. 65. Gidney v. Blake, 11 Johns. Rep. 54. Martin v. Williams, 13 Johns. Rep. 264. Monell v. Colden, 13 Johns. Rep. 402. Mumford v. Fitzhugh, 18 Johns. Rep. 457. Tucker v. Randall, 2 Mass. Rep. 283.

If a plea contain several and distinct matters, divisible in their nature, the plaintiff cannot demur, generally, to the whole, because a part is bad, he should demur to that which is bad, and traverse the residue. Douglass v. Satterlee, 11 Johns. Rep. 16.

So, where several breaches are assigned in pleading, some of which are well assigned, and others not, if the defendant demur generally, the plaintiff shall have judgment. Martin v. Williams, 13 Johns. Rep. 264.

Where there is a demurrer to the whole declaration, and one count is bad, that count cannot be referred to, for the purpose of aiding another count. Nelson v. Swan, 13 Johns. Rep. 483. } Vide ante, (C 32.)

If, on action for *crim. con.* defendant pleads not guilty, and not guilty within six years, and issue to the first, demurrer to the second, verdict for plaintiff on issue, and plea held good on the demurrer; there shall be judgment on the demurrer for defendant, and plaintiff have no damages. Coke v. Sayer, H. 32 G. 2. 2 Wils. 85.

So, in an action on the st. 13 Ed. 1., against an hundred for a robbery of money and goods, if it is bad for the goods, on a demurrer to the whole, the plaintiff shall have judgment for the money; for they are in their nature several. R. 2 Sand. 380.

So, in covenant, where one breach is bad, the other good. 2 Sand. 380. Vide post, (2 V. 3.)

So, in trover, &c. where one article is insensible or uncertain. R. 1 Sal. 218.

The usual form of a demurrer is, that the party alleges *quod narratio, [\*]&c. est minus sufficiens*, and prays judgment of the count, or *quod placitum est minus sufficiens, &c.* Pl. Com. 400. b.

But it is sufficient if it has the substance of a demurrer, though it is not formal; as, if *petit judicium de narratione*, and prays *quod casset*. R. 5 Mod. 132.

Though it does not conclude with an averment, *et hoc, &c.* R. 1 Leo. 24. Vide ante, (E 33.)

So, a demurrer not formally joined is sufficient to bring the matter before the court. R. 3 Lev. 222.

So, now the words, *materiaque in eodem contenta* are added to the old form of a demurrer. Pl. Com. 400. b.

So, a demurrer may be to an *aid prier* and *receit*. Co. Lit. 72. a.

To a voucher. Ibid.

To a wager of law. Ibid.

**(Q 4.) General demurrer.**

A demurrer is general or special. Co. Lit. 72. a.

A man who demurs generally shall take advantage of all matters. Pl. Com. 66. a.

Of all matter which are requisite to show a right or good title in the plaintiff. Hob. 301.

And therefore, if the declaration do not show a sufficient right or title in the plaintiff, it will be bad on a general demurrer ; for a right which does not plainly appear is as none. Ibid.

On demurrer to an indictment found in an inferior court, objections may be taken, as well to the jurisdiction of such court, as to the subject matter of the indictment. 1 T. R. 316.

If a demurrer begins in bar, and concludes in abatement, there shall be final judgment. R. 1 Lev. 312. Vide Abatement, (I 15.)

Plaintiff cannot take advantage of duplicity in defendant's rejoinder, without having shown it for cause of demurrer. Browning v. Dann, M. 9 G. 2. B. R. H. 167.

A demurrer, because more is demanded than the plaintiff is entitled to, must be confined to the excess. 10 East, 139.

If in *scire facias*, or debt on a judgment, two sums are demanded as adjudged ; the one by the original court, the other by the court of error ; and the one is alleged with a *prout patet*, the other not ; a demurrer for the omission must be confined to the latter sum. 11 East, 565.

A demurrer, for the misjoinder of causes accrued in different rights, must be to the whole declaration. 1 M. & S. 355.

If there is a demurrer to a plea in which the point has not been settled, but which the court determines to be good, they will permit plaintiff to move to withdraw demurrer, and to reply. Collins v. Collins, T. 32 & 33 G. 2. 2 B. M. 820.

After demurrer, argued and determined for defendant, plaintiff may have leave to withdraw his demurrer, and reply, on paying costs. Anon. T. 3 G. 3. 2 Wils. 173.

< Where a party demurs to a defective pleading, if the previous pleading be also defective, judgment must be against the demurrer. Gelston v. Burr, 11 Johns. Rep. 482.

Where the time of making a contract is immaterial, it is no ground of demurrer that the contract is illegal by reason of having been made at such time. Amory v. M'Gregor, 12 Johns. Rep. 287.

A departure in pleading, is fatal on general demurrer. Sterns v. Patterson, 14 Johns. Rep. 132. >

**(Q 5.) Confesses all the facts well pleaded.**

A general demurrer confesses all matters of fact well pleaded. Pl. Com. 13. b. 85. a. Co. Lit. 72. a.

And therefore, if a man pleads a demand of rent, and that he was there before sunset, and continued there till the sunset, and no one [\*] was there on the other part, to which there is a demurrer ; the whole fact alleged is confessed, and nothing remains, but whether it be a good demand. Pl. Com. 172.

So, in assize, if the defendant does not traverse seisin and disseisin, but pleads a recovery in bar, the plaintiff confesses and avoids the recovery by his replication, to which the defendant demurs ; this is a confession of the seisin and disseisin. R. 2 Rol. 22.

So, in *assumpsit* upon consideration that he had granted 1000 trees to be cut down in three years, and that he had cut down 800, and then the de-  
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defendant promised to permit him to cut the residue after three years, if he would not cut them down at present; the defendant pleads that he had cut down 1000 before the promise; a demurrer to the plea confesses that he had. R. Yel. 195.

So, in covenant, if the defendant pleads covenants performed, and the plaintiff assigns a breach, and then the defendant demurs, he confesses the breach, and contradicts his own plea. R. Cro. El. 829.

In debt upon bond to pay, if A. died without issue then living, the defendant says that A. died, having issue living *apud* B., and the plaintiff demurs for want of a good venue, he admits that A. had issue living. R. Dy. 15. a.

If defendant demurs to an information *quo warranto*, for exercising an office of public trust, he cannot except that it is not such an office, for he has confessed it. Rex v. Neal, P. 8 G. 2. B. R. H. 106.

In debt on bond to pay, &c. within twenty days after the return of a ship, or at the end of eighteen months; the defendant pleads that the ship returned within eighteen months, and that he paid within twenty days after; the plaintiff replies, and traverses the payment, to which the defendant demurs; the demurrer admits the breach, and therefore the plaintiff shall recover. R. 2 Mod. Ca. 349.

If defendant demurs generally to the whole declaration, and one count is good, and may be joined, there must be judgment for plaintiff. Bedford v. Alcock, T. 22 & 23 G. 2. 1 Wils. 248.

(Q 6.) But a demurrer is not a confession, if the plea, &c. be bad.

But if a count, plea, or replication be vicious, a demurrer thereto is no confession of the matter alleged. R. 2 Rol. 22. 1 Leo. 80.

And therefore, if a plea in *quare impedit* shows a title in the king, and the plaintiff demurs, if the plea be bad, the demurrer is not a confession of the king's title. R. 2 Rol. 22. R. Hob. 164.

If a replevin supposes a taking in a place in A., and the avowry be for rent in B., and the plaintiff says that B. is within A.; a demurrer thereon is not a confession of matter, which is repugnant and impossible and the ground of the demurrer. R. 1 Sid. 10.

So, a thing not material or traversable, is not confessed or admitted by the demurrer, when it is not traversed. R. Sal. 561.

A demurrer admits the existence of those facts only which are properly pleaded. 1 East, 634. 1 T. R. 334.

So, there cannot be a demurrer after issue joined. Semb. Sho. 213.

Where a traverse is immaterial, the adverse party need not therefore demur, but may traverse the inducement. 1 H. B. 376. 2 H. B. 192.

Impertinent allegations will be struck out on motion, and costs allowed. Dougl. 667.

[\*] A defective plea, on the face of it pleaded for delay, may be treated as a nullity. 2 N. R. 188. Thus, a sham plea of judgment recovered in a court of *pie-poudre*. 10 East, 237.

If a defendant, under terms of pleading issuably, put in a plea which does not go to the merits, it will be set aside on motion. 2 T. R. 390.

If a defendant, under terms of pleading issuably, plead several pleas, all of which are issuable but one, that one vitiates the rest, so that judgment may be signed. 3 T. R. 305.

The court will not quash an insensible plea. 4 Taunt. 668.



The only mode of objecting to a plea, single in its form, but bad on the ground of duplicity, is by demurrer. 1 B. & P. 413.

The court are bound without any discretion, to receive a plea *puis darrein* continuance; therefore, if the plaintiff objects to it, he must demur, and not move to set it aside. 3 T. R. 554.

On demurrer to a defective replication, if the plea itself be bad, judgment shall be given for the plaintiff. 2 Wils. 150.

On demurrer to the replication for a discontinuance, the defendant must have judgment, though his plea is bad. 1 B. & P. 411.

**(Q 7.) What matters are aided by a general demurrer.**

By the st. 27 El. 5. after demurrer in any action in any court of record, the judges shall give judgment as the very right of the cause and matter in law appear, without regard to any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, or in any process, except what the party demurring specially and particularly sets down.

And the court, after demurrer, may amend all such imperfections, defect, and want of form.

Provided it extend not to appeals, indictments, or presentments, or actions on popular or penal statutes.

And therefore now a demurrer confesses all matters informally pleaded, if they are not specially shown. Hob. 233. Cont. 3 Mod. 235.

And every thing shall be said to be form, without which the right of action appears to the court. Hob. 233.

And therefore all defects of the clerk, and misprisions, which the court may amend, without varying the matter, are aided by general demurrer. Sav. 87.

But matter of fact not alleged, and which the judge cannot know by the record, cannot be amended, nor shall the omission be aided by a general demurrer. Sav. 88.

And this statute ought to be strained to remedy defects in form. Hob. 133.

And now, by the st. 4 & 5 Ann. 16. after demurrer in any court of record, the judges shall give judgment, &c. without regard to any imperfection, &c. in any writ, &c. or other pleading, process, or course of proceeding, except those the party demurring particularly sets down as causes of the same, although such imperfection, &c. might before be taken as matter of substance, and not aided by the st. 27 El. 5. so as sufficient matter appear in the pleadings, on which the court may give judgment according to the very right of the cause.

If debt in the *debet et delinet* is brought by an administrator against the heir of the obligor, where he bound himself and his heirs, it is good on a [\*] general demurrer, since st. 4 Ann. c. 16. *Burland v. Tyler*, P. 11 G. 2. *Ld. Raym.* 1391.

If to debt on bond to indemnify plaintiff for beer he should deliver to A., defendant pleads none delivered since making the bond, and plaintiff reply so much delivered; it is good on general demurrer, though it does not say before filing the bill. *Thrale v. Vaughan*, H. 16 G. 2. *Wils.* 5.

But matter of form, which is shown specially for cause of demurrer, cannot be amended. *R. Yel.* 38.

So, on a demurrer, matter of form, not specially shown, shall be aided on the part of him who joins, and also of him who demurs, in all parts of the pleadings. *Per rule*, 1654. *Mills*, 29.

Plea of judgment recovered in a plea of trespass on the case, on premises, to the [\*207]

damage of the defendant ; held bad on general demurrer. 7 Taunt. 271. ; Moore, 19.

The want of averring time and place, is, in every case, a ground for special demurrer only. 10 East, 359.

Where a special request is essential to the case, an averment that the party was requested, is only objectionable as wanting time and place. 10 East, 359. In this case it was held, that the want of averring a special request when necessary, is bad on general demurrer, and that the averment " although after requested so to do," is not sufficient. 5 T. R. 409.

If in covenant for rent, an arrear for such a time is alleged to have fallen on an impossible day, or if no day is mentioned, the objection, if any, is a ground for special demurrer. 10 East, 139.

In pleading a bargain and sale, the want of averring a consideration is only a ground for special demurrer. 2 H. B. 259.

The omitting to state the consideration of a bargain and sale cannot be taken advantage of on a general demurrer. Bolton v. Carlisle, C. P. M. 34 Geo. 3. 2 H. Bl. 259. a.

### (Q 8.) Special demurrer : — Founded on special matter.

But a man may allege special matter, and conclude with a demurrer ; as, in trespass by A. for taking a horse, if the defendant pleads that one A. dispossessed him of the horse, and gave it to the plaintiff, the plaintiff may say that A. in the bar, and A. in the count, are the same person, and then demur ; for without special matter alleged the demurrer would not have been good. Co. Lit. 72. a.

If a man demurs specially, he waives all other matters, and relies upon one particular point. Pl. Com. 66. a.

### (Q 9.) Which shows a special cause.

So, since the st. 27 El. 5. if a man demurs for form, he must show specially the causes of demurrer.

And in B. R. he may show them at any time in the same term, or one day after the term, if the demurrer be not entered upon the roll. 2 Rol. 330.

And it is not sufficient that the demurrer be *quia caret forma*, but it must show specially in what point the form is defective. Hob. 232. D. Lut. 4.

And therefore a demurrer for duplicity, *quia duplex et caret forma*, is not sufficient, but it must show in what the duplicity consists. R. in B. R. inter Lamplugh and Shortridge, P. 13 W. 3. 1 Sal. 219. Com. 115.

And by rule in C. B. M. 1654, the causes assigned on demurrers ought not to be involved in general expressions of double, negative, [\*]pregnant, uncertain, want of form, &c. but specially shown, that the other side may join in demurrer, amend paying costs, or discontinue. Mills, 29.

{ The court will not take notice of any informality, unless specially pointed out by the demurrer. Snyder v. Croy, 2 Johns. Rep. 428. Vide Tucker v. Randall, 2 Mass. Rep. 283.

So, where there is a demurrer for duplicity. Currie v. Henry, 2 Johns. Rep. 433. {

If plaintiff sets out a record remaining in C. B., and that the same was removed to B. R. ; it is informal and bad on special demurrer. Wilder v. Buckland, M. 11 G. Str. 611.

If to debt on a bond to indemnify, defendant pleads *quod indempnum conservavit*,  
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plaintiff may demur to it for not showing how ; but it must be shown for cause, for the *how* is only form. *White v. Cleaver*, H. 12 G. Str. 681. 2 Ld. Raym. 1416.

An immaterial traverse is good cause for a special, but not for a general demurrer. *Courtney v. Satchwell*, P. 12 G. Str. 694.

If the plea, &c. conclude with a verification where it ought to conclude to the country, and *vice versa*, that will be bad on special demurrer. *Doug.* 94. 97.

So, the not alleging a protest in a declaration on a bill of exchange. *Salomons v. Stavely*, Dougl. 684. *in notis*.

Demurrer to replication for duplicity, in alleging distress to be in the night, and possession continued by payment of rent, is good. *Browning v. Dann*, M. 9 G. 2. B. R. H. 167.

Defendant cannot demur to declaration, because it says he was summoned, instead of attached, without praying *oyer*. *Busby v. Elliston*, H. 9 G. 2. B. R. H. 189. a.

Defendant cannot demur for a small variance between the writ and the declaration, though it may be pleadable in abatement. *Godfrey v. Duberry*, M. 11 G. 2. Andr. 75.

Where a defect is pointed out by demurrer, the court will not consider it as surplusage. *Barlow v. Evans*, T. 18 G. 2. Wils. 98.

After demurrer joined, on motion the cause shall be put in the paper to be argued by counsel.

The motion ought to be on *oyer* of the record in court.

And if the roll, whereon the pleadings are entered, be of a former term, it must be filed ; if in the same term, it may be read in court without being filed with the other rolls. *Sal.* 565.

If a demurrer or special verdict be entered in court to be argued, the plaintiff's attorney shall deliver two copies of the record to the chief justice and senior judge, and the defendant's attorney to the two puisne judges. Per rule, P. 27 Car. 2. *Mills*, 61.

And no argument shall be heard at the bar before all the judges have copies. *Ibid.*

If the attorney of either party does not deliver, the other may deliver copies to all the judges three days before the argument, and thereon the counsel of his side shall be heard, and he shall be paid for them upon demand, or allowed for them in costs. *Ibid.*

### (Q 10.) Demurrer upon evidence,

Is a proceeding, by which the judges, whose province is to answer to all questions of law, are called upon to declare what the law is upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading. Per *Eyre C. J.* *Gibson v. Hunter*, T. 33 Geo. 3. 2 H. Bl. 205.

If the plaintiff or defendant shows in evidence any record or other writing, whereon a doubt in law arises, the other party may demur on the evidence. *Co. Lit.* 72. a. *R.* 5 Co. 104. a.

So, if he shows evidence by witnesses, whereon a doubt arises, the other party may demur to it. *R.* 5 Co. 104. a. *Baker*. { *Vide Hurst v. Dipppo*, 1 Dall. 20.

Where a deed is produced in evidence, it must be shewn *in hæc verba*, on the demurrer. *Hurst v. Dipppo*, *ut supra*. }

[\*]So, in an information the king may demur to evidence given for the defendant. *Pl. Com.* 4.

But if the doubt be, whether a matter of fact is well proved, the defendant cannot demur to the evidence ; for the jury may find on their own knowledge :

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as, if for proof of an arrest the writ is not produced, the defendant cannot demur. R. 1 Lev. 87.

{ So, if the evidence be clear, the court will refuse to compel the party offering it, to join in demurrer; and will leave it to the jury to determine. *Thweat v. Finch*, 1 Wash. 220. *Wroe v. Washington*, 1 Wash. 362. *Dunbar v. Beale*, 5 Munf. 24. }

If there be a demurrer to evidence, the jury shall be immediately discharged, and need not inquire of the damages; for that may be supplied by writ of inquiry. R. Cro. Car. 143. Doug. 222.

And after the execution thereof, the party may move in arrest of the final judgment, on any objection to the pleadings. Doug. 222.

Yet the same jury may inquire of the damages conditionally. Semb. Cro. Car. 143. Pl. Com. 408. per Mont. Ch. B. 1682. Doug. 222. n. (212.)

So, if at *nisi prius* the defendant pleads a plea after the last continuance, the plaintiff may demur to it. Hard. 112.—When and how he shall plead it, *Vide Abatement*, (I 24.)

- So, if there be a challenge to an array, the other party may demur. Hard. 112.

A demurrer to a challenge may be determined at *nisi prius*. Hard. 112.

But a demurrer to a plea after the last continuance shall be adjourned. *Ibid*.

If a man demurs upon evidence, he must admit the evidence to be true. Co. Lit. 72. a. Cro. El. 751. 5 Co. 104. a. R. All. 18. Pl. Com. 411. a. Doug. 119—134.

And therefore, if a man demurs for that the evidence is not sufficient, and besides says also that there is no such writ as was offered in evidence, and so refers the fact as well as the law to the court, an *alias venire facias* shall go; for the court cannot proceed to judgment. R. Al. 18.

If a man demurs upon the evidence, the other party must join in the demurrer. Co. Lit. 72. a. Or otherwise must waive the evidence. R. 5 Co. 104. a. Baker.

If the evidence be matter of record, or in writing. Cro. El. 751, 752.

But in an information or other suit by the king, if the defendant demurs upon the evidence, the king's counsel need not join. Co. Lit. 72. a. 5 Co. 104. a.

So, if one will demur upon the evidence given by witnesses, the other need not join; for the credit of the witnesses may be referred to the jury. Cro. El. 752.

So, the court may over-rule, if the matter of law seems clear, though the party will demur. R. 2 Rol. 119.

A demurrer to evidence admits the truth of every conclusion of fact which the jury could have inferred from the evidence demurred to. Dougl. 119. So that on a demurrer to circumstantial evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the proposed evidence conduces to prove. 2 H. B. 187. < *Vide Snowden v. Phoenix Ins. Co.* 3 Binn. 457. *Dickey v. Schreider*, 3 Serg. & Rawle, 413. *Ross v. Eason*, 4 Yeates, 54. *Duerhagen v. United States Ins. Co.* 2 Serg. & Rawle, 185. *Patrick v. Ludlow*, 3 Johns. Cas. 10. *Forbes v. Church*, 3 Johns. Cas. 159. *Steinbach v. Columbian Ins. Co.* 2 Caines' Rep. 134. *Smith v. Steinbach*, 2 Caines' Cas. in Error, 158. *Patrick v. Hallett*, 1 Johns. Rep. 241. *Young v. Black*, 7 Cranch, 565. *Stephens v. White*, 2 Wash. 203.

A demurrer to evidence cannot be admitted, where the party refuses to admit the

facts which are attempted to be proved on the other side; nor where he attempts to introduce contradictory evidence, &c. *Young v. Black*, 7 Cranch, 565.

On a demurrer to evidence, no question can arise as to the admissibility of evidence. *Lewis v. Few*, 5 Johns. Rep. 1.

Whether the refusal of a court to compel a party to join in demurrer to evidence, can be assigned as a ground of error. *Young v. Black*, 7 Cranch, 565. *Quere*, *Vide Harrison v. Brock*, 1 Munf. 22.

On a demurrer to parol evidence, if the evidence be doubtful or circumstantial, the party offering it, may specify the facts, which he wishes to have admitted, before he joins in the demurrer. *Duerhagen v. United States Ins. Co.* 2 Serg. & Rawle, 185.

In what cases on a demurrer to evidence, the court may order a *venire de nova*. *Duerhagen v. United States Ins. Co.* *ut supra*.

On a demurrer to evidence the court may draw the same inference that the jury would have drawn. 3 T. R. 182.

[\*] On a demurrer to evidence, the party cannot take advantage of any objection to the pleadings. Dougl. 218.

### (R) ISSUE.

Issue is, when both parties put the cause upon a point of fact to be tried by a jury.

An issue is either general or special. Co. Lit. 126. a.

#### (R 1.) General.

The general issue is, when the issue is joined on the plaintiff's or defendant's whole charge in general: as, if the tenant pleads in *formedon*, *ne dona pas*.

In assize, *nul tort, nul disseisin*.

In *quare impedit*, *ne disturba pas*.

In *quare impedit* there is no general issue. By Ashhurst, J. *Read v. Brookman*, B. R. E. 29 G. 3, 3 T. R. 158.

In replevin, *non cepit*.

In debt, *nil debet*. *Vide post*, (2 W 17.)

In an action on the statute, or on the case, *non culp*.

To the general issue the plaintiff cannot reply, but must join issue. Co. Lit. 126. a. Hob. 271.

When a plea must conclude in issue to the country, *vide ante*, (E 32.)

When the general issue shall be pleaded, *vide ante*, (E 13.)

#### (R 2.) Special.

A special issue is, when issue is joined upon any particular point.

#### (R 3.) Must be upon an affirmative and negative.

An issue proceeds out of two several allegations of the parties, the one affirmative and the other negative. Co. Lit. 126. a.

And, therefore, two affirmatives do not make a good issue. Co. Lit. 126. a. [Dougl. 60.]

As, if the defendant pleads that A. is living, and the plaintiff says that A. is dead, he must traverse that A. is living, otherwise there cannot be a good issue. Sav. 86.

So, if the defendant, being executor, pleads several judgments, and no assets *ultra*, and the plaintiff replies that one of the judgments is continued



by fraud, and that he has assets *ultra*, the others, it is not a good issue without a negative. Semb. 1 Sand. 338.

So, if the defendant pleads that the plaintiff is a bastard, and the plaintiff replies that he is *mulier*, he must add, and not bastard, in the negative. Kit. 214. b.

Nor, two negatives; and therefore, if a man takes a traverse which is a negative, there must be an affirmative after it, before the conclusion to the country. Co. Lit. 126. a.

So, regularly, the plaintiff in his replication ought not to conclude to the country upon a negative, without a traverse; as, in trespass. if the defendant pleads that his father was seised, and died seised, whereby it descended to him, the plaintiff shall not reply that the father did [\*]not die seised, *et hoc*, &c. but must maintain his count, and traverse, *absque hoc* that the father *obit seisitus*. Sav. 64.

Yet, there shall be a general issue upon a negative. Ibid.

So, the king may join issue on a negative. Dub. Ibid.

And when there is a full negative and affirmative, it must always conclude to the country. Vide ante, (E 32.)

But, it is not necessary that the negative and affirmative be in precise words: as, in debt for rent on a lease for years, if the defendant pleads nothing in the tenements, and the plaintiff replies, that he was seised in fee, here is a good issue. Co. Lit. 126. a.

If the defendant claims a way *non solum ire, equitare, verum etiam carucis carriare*, and there be issue thereon, it is good; for here is a sufficient affirmative. R. Mar. Pl. 83.

Yet, if a breach of covenant be assigned, *quod non assignavit*, a lease for years, and the defendant pleads *non transposuit*, it is bad. R. 2 Leo. 116.

And, for necessity, issue may be joined on two affirmatives. Semb. Co. 126. a. Bro. Issue, 28.

So, if issue be tendered by an affirmative, and the other joins, it is good, though there was not a negative; as if an executor pleads no assets, and the plaintiff replies that he purchased another writ, and then he had assets, and tenders an issue thereon, and the defendant joins, it is good. R. 2 Cro. 580. 589. 2 Rol. 186. 204. 209.

It is enough, if the second affirmative is so contrary to the first, that the first cannot in any degree be true; so to duress of imprisonment pleaded to a bond, it is a good replication that defendant was at large, at his own disposal, executed of his own free will, and not for fear of imprisonment, concluding to the country. Tomlin v. Purvis, H. 16 G. 2. Str. 1177, Wils. 6.

#### (R 4.) Must be upon a single point.

The issue ought to be on a single and certain point. Co. Lit. 126. a.

And, therefore, if after a justification by process in false imprisonment there be a traverse *absque hoc quod est culpabilis aliter aut alio modo aut in alio loco*, and issue joined thereon, the judgment shall be arrested for the uncertainty of the issue. R. 2 Lev. 164.

But if the defendant, sued as executor, pleads payment of several sums due on several bonds, and the plaintiff replies *quod non solvit*, such a sum to A., such to B., &c. and concludes *et de hoc ponit se super patriam*, it is well; for they are several issues, and not one multifarious issue. R. 1 Lev. 281.

Issue cannot be taken on a general averment of performance. Cowp. 578.

Several facts may be put in issue, if they all make only one point of defence. *3 Smith, 77.*

If to debt on bond, defendant pleads insolvent act, that he was beyond seas, a fugitive for debt, that he was a person enabled to return, did return and surrender, and was duly discharged, and plaintiff replies not duly discharged, he puts only the discharge in issue, and defendant need only prove that, by producing the duplicate. *Gillam v. Stirrup, T. 8 G. 2. B. R. H. 145.*

[\*] Though issue must be taken on a single point, it is not necessary that a single point should consist of a single fact; thus, if defendant in trespass justifies under a right of common, and the replication traverses that the cattle were defendant's own, that they were levant and couchant, and that they were commonable, it is not multifarious; for both circumstances are requisite to the one point of defence. *Robinson v. Rayley, P. 30 G. 2. 1 B. M. 316.*

### (R 5.) Not upon a negative pregnant:—What shall be called so.

So, an issue on a negative pregnant, viz. on matter which imports other sufficient matter, is bad; as, in a writ of entry *in consimili casu*, if a man counts of an alienation in fee, and the defendant pleads that he did not alien in fee, it is bad; for it implies that he aliened, though not in fee. *Dy. 17. a.*

So, in *formedon*, where the demandant counts on a gift by deed, if the tenant says, *ne dona pas* by deed, it is bad; for this implies a gift by parol. *Co. Lit. 126. a.*

In waste against a lessee for years, if the defendant pleads that he did not lease for years, it is bad; for it is a negative pregnant. *Kit. 232. b.*

In an action against an innkeeper, plea, that the goods were not stolen through default of him or his servants, is bad: for it is a negative pregnant. *Kit. 233. a.*

So, in an action for not taking care of his fire, plea, that the house was not burnt for want of his good care, is a negative pregnant. *Kit. 233. a. b.*

So, if the day or place is parcel of the issue. *R. 2 Lev. 11.*

In debt on a bond for performance of a covenant, which was, that he would not grant without the plaintiff's consent, if the defendant pleads that he did not grant without the plaintiff's consent, it is bad. *R. 2 Cro. 560.*

In trespass, the defendant justifies his entry by the plaintiff's license, traverse, *quod non intravit per licentiam suam*, is a negative pregnant. *R. 2 Cro. 87.*

### (R 6.) What not.

But, if the matter implied be not sufficient, it is not a negative pregnant; as, in debt upon a retainer in husbandry, if the defendant pleads that he did not retain him in husbandry, it is not pregnant; for a retainer generally is not sufficient to maintain his count. *Bro. Issue, 25. R. 38 H. 6. 22.*

So, if the issue be tendered to the point of the action, it is not bad, though it be a negative pregnant: as, in an action upon the stat. *R. 2.* plea, that he did not enter *contra formam statuti*, is good, though a negative pregnant. *Kit. 232. b.*

So, in an action upon any statute, that he did not do *contra formam statuti*, is good. *Kit. 233. a.*

So, in debt on a bond to stand to an award, so that it be delivered to the parties, &c. plea, that no award was made and delivered to the [\*] parties, is good, though a negative pregnant; for it is pursuant to the condition, which is entire. *Ibid,*

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## (R 7.) Yet it may be upon a disjunctive.

But issue may be upon a disjunctive, where the words of the disjunctive proposition are synonymous : as, an issue that gold was found in a ship passing, or upon its passage, from London to R., is good. R. Hard. 17. 19.; for the parts of the disjunctive are synonymous.

That the customs were not concealed or withheld. Hard. 17. Dy. 43. b.

That he paid or caused to be paid. Hard. 19.

That an executor of his own wrong *administravit seu aliter ad usum suum proprium convertit*. R. Hob. 49.

## (R 8.) Must be upon a material point.

So, the issue ought to be on a material point, that may be well tried. Co. Lit. 126. a.

On the most material point. D. 1 Sand. 22.

And, therefore, place or time ought not to be part of the issue, where they are not material. R. 2 Sand. 317. Hard. 40.

But, if the defendant alleges a request by A. such a day, and the plaintiff says, *non requisivit prout defendant allegavit*; this does not extend to the time, but only to the substance of the plea. R. Hard. 40.

A contract for stock should be registered before 1st November, 1721 :—If defendant pleads that the contract was not registered before 1st November 1720, *secundum formam stat.* and plaintiff replies, it was registered *sec. form. stat.* it is good, and the day shall be rejected as surplusage. Wolley v. Briscoe, T. 9 G. Str. 554.

In debt on bond, if defendant pleads payment of principal and interest before the day, and before purchasing the original, plaintiff may reply *non solvit modo et forma*. Martin v. Pritchard, H. 11 G. Str. 622.

In debt on bond, if defendant pleads *plene administravit*, and plaintiff replies, assets sufficient to satisfy the damages aforesaid, and issue is joined, and a verdict for plaintiff, it is well; for the word (damages) is surplusage. Collet v. Masterman, M. 22 G. 2. 1 Wils. 238.

Where two distinct facts are stated, each of which is essential to the party's case, his adversary may traverse either. 6 T. R. 462.

Whether a formal traverse is material or immaterial, depends upon whether the fact it asserts is essential to support the inducement to the traverse. 1 H. B. 376.

Issue joined on *nil debet* in *assumpsit* on a bill of exchange, is a material issue. 1 H. B. 644. But such plea may, in the first instance, be considered a nullity. 4 Taunt. 164.

Trespass for fishing in a free and a several fishery. Plea, that the *locus in quo* is an arm of the sea, in which every subject has a right to fish. Replication claimed an exclusive right, and traversed that every subject had a right to fish in the said arm of the sea; objected that the averment upon which the issue was tendered was only a consequence of law resulting from the premises. But held, that the issue was well tendered. 4 T. R. 437.; but judgment reversed, 5 T. R. 367.; 2 H. B. 182.; 1 Anst. 231.; in which it was held, that where a fact is stated from which the law presumes a general right of all the king's subjects, that must be negatived by a particular contradictory right. The issue cannot be on the general right. 1 Anst. 231.

[\*] In trespass for breaking and entering the plaintiff's house, and continuing there from, &c. till the commencement of the suit, the defendant, as to the continuing in

the house for a part of the time, "to wit, for the space of two days," justifies the sheriff under a *si. fa.* issued against the goods of T. K. deceased, the hands of the plaintiff's wife, as administratrix, to be administered; and, that having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in declaration mentioned, the same being a reasonable time in that behalf. The replication alleges, that the two days mentioned in the plea, were an unreasonable length of time for the defendant's searching for the goods; and then new assigns. Held, that the replication was bad, as tendering an immaterial issue, and as being double. 1 Mars. 333. 5 Taunt. 765.

(R 9.) And the whole shall be put in issue.

And the whole matter of complaint shall be put in issue; as, in *assumpsit* for service for such a time, the defendant shall put the whole time in issue. 1 Sand. 268, 269.

So, in an action on the case for stopping three lights, every part of the injury shall be put in issue; and, therefore, a justification of the stopping of two lights, with a traverse that he stopped three, is bad. R. Yel. 225. 1 Sand. 268. 2 Sand. 206.

But an issue cannot be taken in more extensive terms than those in which it is tendered. 1 T. R. 590.

(R 10.) Upon a triable point.

So, it ought to be upon a point which may be well tried; as, if it be alleged that a woman was *enseint* by her husband at the time of his death, the issue must be, if she was *enseint*, not if *enseint* by her husband, for *filiatio non potest probari*. Co. Lit. 126. a.

No issue can be offered that is contrary to the record. Crockat v. Jones, M. 13 G. Str. 734. Ld. Ray. 1441.

(R 11.) The form of joining issue, and when and how the issue shall be entered, &c. for trial.

If the defendant tenders an issue, he shall say, *et de hoc ponit se super patriam*. Co. Lit. 126. a.

If the plaintiff or demandant, *et de hoc petit quod inquiratur per patriam*. Ibid.

And if *hoc petit* be omitted, it is bad. 3 Lev. 65.

But, if the plaintiff joins issue in these words, *et prædict.*, defendant *si lit.*, where it should be *præd.* plaintiff; this will be jeofail. 1 Rol. 200. l. 2. 25.

Or, *quod est cul.*, for *non est inde cul.* 1 Rol. 200. l. 10.

So, if the defendant says, *solvit ad secundum diem M.*, and the plaintiff replies, *non solvit prædicto secundo die Aug.*, and so mistakes the month. R. 2 Cro. 550. 2 Rol. 135.

So, if the defendant says, *solvit 20l.* and the plaintiff *non solvit præd. 30l.* R. 2 Cro. 586. R. Cro. Car. 593.

So, in trespass, if the defendant pleads a license to the husband to enter with his wife, and the plaintiff replies, *quod non dedit licentiam* to husband and wife; for the variation is material. R. 2 Lev. 194.

[\*] If plaintiff replies, and concludes to the country, without any *similiter* on the part of defendant, it is not aided by verdict, nor can the verdict, be amended. Cooper v. Spencer, M. 11 G. Str. 641.

On replication *nul tiel record*, complete issue is joined, and there is no need of rejoinder. Barnes, 335.

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On *nil tiel record* pleaded, the record must be brought in at the day given. Barnes, 243.

By the usual course, four days are given to join issue, demur, or plead over. 1 Sand. 318.

And if the clerk of the papers draws the issue, and delivers the paper-book to the defendant's attorney, who within the four days waives the issue, and makes a frivolous rejoinder for delay, and, upon a summons before the secondary, will not take issue, the plaintiff may sign judgment by *nil dicit*. R. 1 Sand. 318.

In C. B., if the defendant pleads the general issue, (for which it is sufficient that his attorney signs the plaintiff's attorney's docket), the plaintiff's attorney draws and delivers a copy of the issue to the defendant's attorney, who must receive and pay for it. Com. Att. 40.

If a prisoner appears by attorney, he shall pay for the issue-book, or judgment may be signed; but not if he appears in person. Everall v. Mason, H. 27 G. 2. 2 Wils. 11.

Defendant's attorney must pay for the issue, (even if left in the office), at his peril. Barnes, 243.

But if plaintiff demands more than is due, judgment signed shall be set aside. Barnes, 263, 275. 2 Bl. 1098.

If judgment is signed for want of paying for the issue, the court will set it aside, on payment of costs of motion, and for the issue, if it is to the country; but not if it is on *nil tiel record* to a judgment, and there are no merits to be tried. Everall v. Mason, H. 27 G. 2. 2 Wils. 11.

If it be tendered to a porter at defendant's attorney's chambers, and not paid, judgment may be signed. Barnes, 253.

An agreement that issue shall be delivered in the country is void; therefore, if notwithstanding such agreement it is tendered in town, and not paid for, judgment may be signed. Barnes, 251. Semb. contra, Barnes, 239.

But in B. R. the defendant's attorney has the benefit of the issue. C. Att. 324.

So, after a special plea to issue in C. B. the plaintiff's attorney delivers a copy of the issue, &c.

If plaintiff has delivered the issue-book to defendant, and afterwards mislays the papers, the court will order defendant to give him a copy of the issue. Wier v. Smith, H. 7 G. Str. 414.

In rules for entering issues the day of notice is exclusive; and *non-pros.* signed a day too soon shall be set aside. Barnes, 318.

In B. R. after plea to issue, it is left with the clerk of the papers, who gives a rule to the other side to join or demur, and draws the issue, and shall be paid for the issue-book. Com. Att. 325.

If the defendant gives a rule to the plaintiff to enter his issue, if the action lies in London or Middlesex, the plaintiff must bring the record into the office within four days after notice of the rule, otherwise he shall be nonsuited. Pr. R. 274.

But the defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll, before he signs judgment of *non-pros.* even though he may have searched on the expiration of the rule to bring in the roll. Minus v. Baxter, B. R. M. 26 G. 3. 1 T. R. 16.

[\*] And, if the plaintiff has given notice of trial, the rule for entering the issue may be given the same term in which issue is joined, in an action in London or Middlesex. Pr. R. 275.

In an action in another county, on such rule, (which shall not be the same term in which issue is joined), the plaintiff must enter his issue before the continuance-day of that term. Pr. R. 274.



And, if the general or special issue be not entered in due time, the plaintiff shall be nonsuited. Lut. 98.

The copy of the issue to be tried in London or Middlesex, on a record of a precedent term, shall be brought to the clerk of the treasury to be engrossed four days before the day of trial. Per Rule, M. 1654. (Vide Mills, 30.)

And no record of *nisi prius* shall be signed before issue entered on the roll. (Vide Mills, 31.)

In C. B. no record of writ or *nisi prius* received at sittings after term in Middlesex, unless entered with marshal within two days after term; and in London the day before the day of adjournment. Barnes, 494.

And the issue shall be entered of the same term in which it is joined. Per Rule, P. 5 W. & M. (Vide Mills, 111.)

Which rule is imperative. 3 East, 204.

The record of *nisi prius* shall be ingrossed on parchment of the same breadth with the rules of the court. Per Rule, Tr. 29 Car. 2. (Vide Mills, 70.)

And the prothonotary shall not sign it, if it is not ingrossed and entered upon the roll in a fair hand, and every pleading begin a new line, and with great letters, and if there are divers counts they shall be numbered in the margin. Per Rule, Tr. 29 Car. 2. (Vide Mills, 70.)

And the officer who signs, and the clerk of the treasury who ingrosses it, shall take the same care. Tr. 29 Car. 2. (Vide Mills, 70.)

The records of *nisi prius* of C. B., shall be signed by the prothonotary, and signed and sealed by the clerk of the treasury or his deputy, within three weeks after Hilary and Trinity terms, and not after without special warrant. Per Rule, Tr. 29 Car. 2. (Vide Mills, 72.)

If, after the record of *nisi prius* is signed, the judge is made a knight, it is not error. R. Latch. 161.

The delivery to a gaoler of notice of trial against a prisoner shall be good, within the reason of 4 & 5 W. & M., which directs the delivery of a declaration to be good. Whitehead v. Barber, H. 6 G. Per cur. on conference with the other courts. Str. 248.

In all cases (except where the defendant has delayed the cause by injunction) where there have been no proceedings for four terms, exclusive of the term in which the last proceeding was had, a term's notice is necessary before the next proceeding. Vide 2 Bl. 784. Doug. 71.

Giving notice of trial at the end of half a year after issue joined, prevents necessity of giving a term's notice till a year after the last notice given and countermanded. Green v. Gauntlett, M. 9 G. Str. 531. Richards v. Harris, B. R. M. 43 G. 3. 3 East, 1.

When a term's notice of trial is required on an old issue, it must be given before the essoin-day. Bogg v. Rose, P. 15 G. 2. Str. 1164. Contra, Harvey v. Porter, M. 6 G. Str. 211.

By stat. 14 G. 2. c. 17. defendant living forty miles off shall have ten days' notice of trial in writing, and six days' notice of countermand, on pain of costs.

[\*] And verdict shall be set aside for want of it. Barnes, 305.

The plaintiff is not bound by the practice of B. R. to give notice of trial till the term after that in which issue is joined. Hall v. Buchanan, B. R. M. 29 G. 3. 2 T. R. 734.

Where the defendant resides 40 miles from London, there must be 14 days' notice of trial, though he was arrested, and the venue laid, in town. 2 Bl. 1205.

Take notice of trial at next assizes, without date, county, or name, is good on the back of the issue, but not on a separate paper. Henbury v. Rose, M. 19 G. 2. Str. 1237.

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Where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission day, one day exclusive, and the other inclusive. 3 T. R. 660.

Short notice of trial can be given but once, and notice can be continued but once; but if the full time is given, the word continue shall not vitiate it. Barnes, 292.

Plaintiff can continue his notice of trial only once in a term, and if verdict is obtained on second, defendant making no defence, it shall be set aside. Green v. Gifford, M. 13 G. 2. Str. 1119.

A continuance of a void notice of trial given within the regular time, may operate as a new notice. 2 Bl. 1298.

If the issue is of Michaelmas, notice by proviso may be given of Hilary. Barnes, 295.

Notice of trial cannot be given in the country, but countermands may. Barnes, 298. Qu.

But notice on an old issue may be given, either in town or country. Barnes, 306. Qu. Whether not on any?

Defendant must give the same notice as plaintiff. Barnes, 299.

Where the defendant carries down the record by proviso, it is sufficient, if he obtain the usual rule for trial by proviso, any time before trial, though after he has given the plaintiff notice of trial. 1 T. R. 695.

A defendant in a case where the king is party, cannot carry down the *nisi prius* record to trial by proviso, as no laches can be imputed to the king. Rex v. Dyde, E. 38 G. 3. 7 T. R. 661. Rex v. Macleod, H. 42 G. 3. 2 Bos. & Pull. 202. (Vide Banks's Case). 6 Mod. 247. Salk. 652.

Notice cannot be countermanded and continued at the same time. Barnes, 301.

If notice of trial is countermanded, two days in a town cause, and four days before the assizes in a country cause, costs shall not be paid, but one day must be exclusive. Whitlock v. Humphreys, M. 3 G. 2. Frogmorton v. Norcliffe, M. 6 G. 2. Str. 849.

In a country cause, two days' countermand to the attorney in the country is sufficient. Mendapace v. Humphreys, P. 10 G. 2. Str. 1073. B. R. H. 369. Barnes, 298, altered by 14 G. 2. c. 17.

Commission day of assize on Monday, countermand on Saturday good. Barnes, 305.

**(R 12.) When misjoining an issue shall be aided.—By the st. 32 H. 8. 30.**

But by the st. 32 H. 8. 30, after verdict, misjoining of issue is aided. Vide Amendment, (O.)

And, therefore, it shall be aided, if issue is joined upon bad pleading. Ibid.

Or, upon an immaterial point, or a negative pregnant. Ibid.

Or, if the issue comprehends more than is material. R. Hob. 119.

But, it is not aided, if it be a void issue. Vide Amendment, (O).

**[\*](R 13.) By verdict.**

So, a bad issue may be aided by a verdict: as, in debt upon a bond against the executor of A. who pleads *non est factum scriptum*, if the jury finds that it is the deed of A.; for the issue was upon an affirmative and negative, and by the finding of the jury it appears that the plaintiff had cause of action. R. Ray. 458.

Yet, in debt upon a bond to pay the clear profits of a mine, the defendant pleads performance, the plaintiff replies, that there were profits to the value of 20%. and the defendant has not paid; the defendant rejoins that

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there were no clear profits, and issue thereupon, and the jury find that there were clear profits, *modo et forma*, as the plaintiff has replied; this was not aided by the verdict. R. 2 Lev. 135.

If to trespass for breaking his close, defendant pleads it was his proper lands, and plaintiff replies it was his estate of inheritance, and proper lands, and not of defendant; it is cured by verdict. Cary v. Hinton, P. 7 G. 2. Str. 973.

Where an issue is not taken distributively, and the verdict finds as to parcel, judgment shall be given for so much. 3 B. & P. 348.

### (R 14.) When an issue shall be tried.

If one of the defendants pleads in abatement a plea which abates the writ as to all, and the others plead to issue, the issue shall not be tried till the plea in abatement is determined. Kit. 239. a.

Though the plea to issue was first taken. Ibid.

If the defendant demurs to part of the declaration, and takes issue to other part, there shall be judgment on the demurrer before the issue is tried, regularly; though the court may do otherwise at discretion. Co. Lit. 72, a. Latch. 4. 1 Leo. 82.

If, a plea in abatement being over-ruled, the defendant pleads not guilty, the whole record must be entered, otherwise it will be irregular. R. Carth. 499.

So, if a new trial is granted, and the record is on a new roll in a subsequent term. Ibid.

But, in an information for counterfeiting receipts, and by them receiving money out of the Exchequer, if the defendant traverses the counterfeiting, and pleads to the residue, whereon there is a demurrer, the court will try the issue first, (Com. 109.)

Where separate actions are brought against different individuals for injurious acts arising out of the same transaction, in one of which a demurrer has been joined, in the others issues in fact, and the important question upon which all turn, is that raised by the demurrer, the trial in the latter will be postponed until the demurrer has been determined. 13 East, 27.

### (R 15.) When it may be waived.

If several issues are joined and brought to trial, yet the king by his prerogative (where the king is concerned) may waive any issue. 1 Bul. 197.

So, after evidence given to any of the issues, on which the jury are ready at the bar to deliver their verdict, the attorney-general for the king may waive any issue whereon no evidence has been given. R. 1 Bul. 197.

[\*]So, after notice of trial, the king may waive the trial without payment of costs. 1 Sal. 193.

Otherwise, the prosecutor. 1 Sal. 193.

But, if evidence is given on the issue, the attorney-general cannot waive it, when the jury is at the bar to deliver their verdict. 1 Bul. 197.

So, after verdict pronounced, the king cannot waive part of the issues; and take a verdict for the residue. Ibid.

### (R 16.) When the trial deferred.

So, for cause, the court may put off the trial on payment of costs, after notice of trial given: as, if a material witness is beyond sea.

The absence of witnesses is no ground for putting off the trial, where trial might have been had before their departure, but for unnecessary delay. 1 B. & P. 33.

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Nor where their testimony is to establish an odious defence. *Id.* 454. Nor where the case is suspicious, and they are foreigners resident abroad, and not likely to come over. 3 Burr. 1513. 1 Blk. 510. *Lofft.* 653. 769. But the fact of their departure before action brought is no objection. *Lofft.* 329.

That a commission to examine witnesses may be procured, is no ground for putting off the trial where an opportunity to procure it has been once lost by neglect. 1 B. & P. 210.

The trial in action against a banker for money paid in, was postponed until an indictment against the plaintiff for a theft had been tried, on a surmise that it was the produce of the felony. 4 Taunt. 825.

If there has been any delay in the interval between the first process issuing against a defendant, and the filing of the information against him, and during that interval he has gone abroad on his duty, as well as some of his witnesses, the court will postpone the trial on motion. 2 Price, 116.

But in such case, if the costs are not paid, the plaintiff may proceed to trial, and not have an attachment. 1 Sal. 83.

So, a trial shall not be put off where the plaintiff is administrator, because a suit for administration in the ecclesiastical court is not determined. Sal. 646.

But trial, on collateral issues, though in capital cases, shall not be put off, unless the defendant make oath of the truth of his plea. 1 Bl. 4. 512.

If one moves to put off trial on the day of trial, notice must be given of the motion, and also copies of the affidavits to be produced. *Edwards v. Vesey*, T. 8 G. 2. B. R. H. 128.

The court will not put off a trial till a third person is compelled in equity to produce a deed, unless there appears collusion with plaintiff, and affidavit is made that defendant cannot go to trial safely without it. *Anon.* T. 10 & 11 G. 2. B. R. H. 290.

The court will not make a rule on a plaintiff who brings an action on a bond, to allow an officer of the stamp-duties to inspect it, on suspicion of its having been forged. *Chetwind v. Marnell*, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 271.

If plaintiff does not go on to trial according to notice, the court will not stay proceedings till he has paid costs, though he is necessitous and absconds, in any case but ejectment. *Wareing v. Potter*, T. 10 & 11 G. 2. Andr. 17.

If, previous to a trial, libels have been dispersed by one of the parties to influence the jury and witnesses, it may be put off; but the court will not afterwards put it off till the libellers (printers and booksellers) have been tried on an information. *Rex v. Gray*, H. 31 G. 2. 1 B. M. 510.

[\*] To put off trial for absence of witness, when there is any suspicion, it must be made appear that the witness is material, that the party applying has been guilty of no neglect, and that there is reasonable expectation of being able to procure their attendance at the future time prayed. *Rex v. D'Eon*, T. 4 G. 3. 3 B. M. 1513.

And where a witness will be absent for a long time, as 18 months, a special case is requisite to put off a trial for want of his evidence. 1 Bl. 436.

But a trial may be put off till a commission shall go to examine a material witness, who is out of England, and refuses to attend the trial. 1 Bl. 512.

And, if a party refuse to consent to the examination of a witness to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party by putting off the trial. Doug. 419.

Motion to put off trial must be two days before trial. Barnes, 437, 438.

And it cannot be made on the last day of term, or so late as not to leave sufficient time for shewing cause therein. 3 Taunt. 315.

If the materialness of witness did not appear sooner, trial may be put off after the cause called. Barnes, 452.

The application to put off the trial on the absence of a material witness may be made as well on the affidavit of a third person as on that of the party himself. Barnes, 448. Semb. cont. *Id.* 437.

Affidavit for new trial must be positive as to witnesses being material; it must add that party cannot safely proceed without; but to that, belief is sufficient. *Ibid.*

On affidavits that a material witness is not expected till such a time, trial may be put off till term after that time. Barnes, 440.

If witness leaves town after notice of trial, it shall not be put off. Barnes, 442.

In action for words, general affidavit of absence of witnesses is sufficient. Barnes, 442.

Affidavits sworn before a vice-consul abroad may be read. Barnes, 466.

The court will not receive the affidavit of an attorney's clerk to put off a trial, unless it be stated that the clerk was particularly acquainted with the circumstances of the cause, and had the management of it. *Sullivan v. Magill*, C. P. E. 31 Geo. 3. 1 H. Bl. 637.

A criminal information having been granted against the defendant, he, before the trial at *nisi prius*, distributed hand-bills in the assise term, vindicating his own conduct and reflecting on the prosecutors; this matter being disclosed to the judge at *nisi prius* by an affidavit, was held a sufficient ground to put off the trial. *Rex v. Jolliffe*, T. 31 Geo. 3. 4 T. R. 285.

Motion for putting off the trial, cannot be made at *nisi prius* when it might have been made in Bank. C. B. East. 49 Geo. 3. 1 Taunt. 565.

The trial shall not be put off by consent at *nisi prius*. C. B. Mich. 50 Geo. 3. 2 Taunt. 221.

An affidavit by an attorney's clerk to put off the trial, must state that he managed, and was particularly acquainted with all the circumstances of the cause. 1 H. B. 637.

### (R 17.) When there shall be a new trial.

New trials were granted before 1655. This appears from *Slade's case*, Style 138. and from *Wood v. Gunston*, Style 466. It cannot be traced far back, because old reports give no account of determinations on motions. 1 B. M. 390.

And trials by jury, in civil causes, could not subsist now without a power somewhere to grant new trials. D. per Lord Mansfield. *Bright v. Eynon*, T. 30 & 31 G. 2. 1 B. M. 390.

[\*]An application for a new trial is to the discretion of the court, who will exercise it in such a manner as will best answer the ends of justice. If they see that those ends have been fulfilled, they will not grant a new trial upon a technical objection, such as a misdirection of the judge. 2 T. R. 4. 4 Lofft. 521.

{ Vide *Kimball v. Cady*, Kirby, 41. *Granger v. Bissell*, 2 Day, 364. *Lewis v. Hawley*, 1 Conn. Rep. 49. *Commonwealth v. Eberle*, 3 Serg. & Rawle, 9. *Henderson v. Moore*, 5 Cranch, 11. *Marine Ins. Co. v. Young*, 5 Cranch, 167. *Barr v. Gratz*, 4 Wheat. 213. }

The rule relative to the granting of new trials is this: it must clearly and manifestly appear, that the jury have given their verdict under a misconception of the law, or have given it believing what they ought to have disbelieved, or disbelieving what they ought to have believed. The rule of law which ought to govern a particular case can always be ascertained: the state of facts is frequently doubtful, when it is peculiarly the province of the jury to decide the question; and wherever there is room to doubt, the court will not grant a new trial, because the inclination of their opinion is at variance with the verdict of the jury. The opposition, then, is merely opinion against opinion, hypothesis opposing hypothesis; not truth and certainty, and manifest falsehood and error. 4 M. & S. 192.

On applying for a new trial, the only question is, whether, under all the circumstances, the verdict be or be not according to justice, without regarding any slip which the judge may have made in his direction. 5 T. R. 425. Lofft. 521.

{ Vide *Goodrich v. Walker*, 1 Johns. Cas. 250. *Brazier v. Clapp*, 5 Mass. Rep. 1. *Jones v. Fales*, 5 Mass. Rep. 101. *Newhall v. Hopkins*, 6 Mass. Rep. 350.

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*Eggsell v. Brown*, 1 Mass. Rep. 237. *Gerrish v. Bearce*, 11 Mass. Rep. 201. *Booden v. Ellis*, 7 Mass. Rep. 507. *Granger v. Bissell*, 2 Day, 364.

So, a new trial will not be granted for a misdirection, or an omission in the charge to the jury, where such misdirection or omission can have no effect upon the final decision of the cause. *Hoyt v. Dimon*, 5 Day, 479.

So, a judgment will be affirmed on error, where the court refused to charge the jury on a point relative to the issue, and the verdict was the same as it must have been, if the charge had been given as desired. *Douglass v. M'Allister*, 3 Cranch, 298.

So, in an information, in nature of a *quæ warranto*, charging the defendant with having usurped the franchises of an office, a new trial ought not to be granted for a misdirection, where it appeared, that the term of the office had expired, and a new annual election of officers had been made. *State v. Tudor*, 5 Day, 329.

And the court will take into consideration whether the misdirection of the judge was material, or not, and, accordingly, grant, or refuse a new trial. *Fleming v. Gilbert*, 3 Johns. Rep. 528. *Dole v. Lyon*, 10 Johns. Rep. 447. *Vide Depeyster v. Columbian Ins. Co.* 2 Caines' Rep. 85. *Hoyt v. Dimon*, 5 Day, 479. *Williams v. Cheeseborough*, 4 Conn. Rep. 356.

But, in general, a new trial ought to be granted, for a misdirection of the judge, in a matter of law; although the object to be obtained by the party, may not be important. *Boyden v. Moore*, 5 Mass. Rep. 365. *Dudley v. Sumner*, 5 Mass. Rep. 487, 488.

Yet, when the mistake arising from the misdirection, is of small consequence, the court may impose such terms upon the party moving for a new trial, as shall be deemed equitable, under all the circumstances of the case. *Boyden v. Moore*, 5 Mass. Rep. 365. *Vide Welsh v. Dugar*, 3 Binn. 337.

So, a new trial will be granted, if the judge omit to instruct the jury, on the ground that the case is too clear for one of the parties, to require it; and the jury find for the other party; and it seems, that either party may lawfully claim from the judge the benefit of his instructions to the jury. *Page v. Pattee*, 6 Mass. Rep. 459. }

A new trial will be refused, unless the objection on which, &c. either was or could not have been made at the trial. 2 T. R. 113. 713. 3 T. R. 8. 1 Taunt. 12. 2 Taunt. 55. *Id.* 217. n. (a).

Where the question is involved in great doubt and obscurity, is of great value, and binds the right for ever, the court will grant a new trial; where, in an ordinary case, they would refuse it. 3 Taunt. 91.

But value and importance are not alone grounds for granting a new trial, though they frequently weigh in granting a rule *nisi*. 2 T. R. 113.

{ And where the evidence is sufficient to justify a verdict in favour of the party offering it, if the judge instruct the jury that the evidence is wholly insufficient, a new trial will be granted. *Aylwin v. Ulmer*, 12 Mass. Rep. 22. *Tyler v. Ulmer*, 12 Mass. Rep. 163. }

A new trial may be granted as to one of several issues. 6 T. R. 626.

If regular notice of trial was not given, the verdict shall be discharged upon motion and a new trial granted. Pr. Reg. 248.

As, if notice was not given to the defendant himself, his attorney, or solicitor, eight days exclusive, if the trial be in London or Middlesex, or within 30 or 40 miles distance. Pr. Reg. 388, 389.

If there was not 14 days' notice, where the party is at the distance of 40 miles or more. Pr. Reg. 389. Mod. Ca. 18.

The 40 miles from London, to entitle to 14 days' notice of trial, shall be computed and not measured miles. *Bates v. Pettipher*, M. 7 G. 2. Str. 954. *Osgood v. Lyon*, M. 18 G. 2. Str. 1216.

If there was not a term's notice, where the issue was joined a year before. Pr. Reg. 387. 1 Sid. 34.—viz. if 4 terms have past without proceeding,

since the term in which the issue was joined. Mod. Ca. 18. Sal. 645, 650.

And to make a term's notice, it ought to be given regularly in the prior term *sedente curia*. Mod. Ca. 18. 58.

So a proceeding in the vacation after the fourth term, by taking out a *venire facias*, &c. tested the last day of the term, is not sufficient, though it be in law an act within the term. R. Mod. Ca. 57. Sal. 457. 650.

But a term's notice is not necessary, for the usual notice is sufficient, where the delay for a year after issue joined was by an injunction out of the court of chancery served at the suit of the defendant. R. 1 Sid. 92.

[\*]Or, by the defendant's claiming privilege of parliament. R. 1 Sid. 92.

So, it is not necessary where the defendant gives notice of trial by *proviso*. Dub. 1 Sid. 34.

Nor, where there was notice of trial (though countermanded), or any proceeding by the plaintiff, within the year. R. Mod. Ca. 18. 58.

Nor, where the proceedings have not ceased for a year, exclusive of the term in which issue was joined. Mod. Ca. 18. 58.

So, 14 days' notice is not necessary, where there are not 14 days between the term and assizes. Mod. Ca. 18.

So, a new trial shall be granted, if the judge certifies the verdict to be contrary to the evidence. 2 Mod. 199. { Vide *Hart v. Hosack*, 1 Caines' Rep. 25. *Mumford v. Smith*, 1 Caines' Rep. 520. *Hoyt v. Gilman*, 8 Mass. Rep. 336. *Bartholomew v. Clark*, 1 Conn. Rep. 472. *Cowperthwaite v. Jones*, 2 Dall. 55. *Griffith v. Willing*, 3 Binn. 317.

But in penal actions, and actions founded in tort, the court will not grant a new trial merely because the verdict is against the weight of evidence; unless some rule of law has been violated. *Jarvis v. Hatheway*, 3 Johns. Rep. 180. *Hurtin v. Hopkins*, 9 Johns. Rep. 36. *Feeter v. Whipple*, 8 Johns. Rep. 287. 2d edit.

So, where the evidence is doubtful, a new trial will not be granted. *Defonclear v. Shottenkirk*, 3 Johns. Rep. 170. *Wait v. M'Neil*, 7 Mass. Rep. 261. *Hall v. Huse*, 10 Mass. Rep. 39.

So, if a verdict be against the opinion of the judge, who tried the cause, yet if the question depends on the credit of witnesses, a new trial will not be awarded, except in extraordinary cases. *Fehl v. Good*, 2 Binn. 495.

It must be a very strong case, which would induce the court to grant a new trial, where the judge who sat at the trial, was not dissatisfied with the verdict. *Cain v. Henderson*, 2 Binn. 108. *Ludlow v. Union Ins. Co.* 2 Serg. & Rawle, 119.

A motion for a new trial, on the ground that the verdict is against evidence, must be decided, exclusively, upon the evidence given at the trial. *Street v. St. Clair*, 6 Munf. 457. }

If judge certifies weight of evidence contrary to verdict, new trial granted. *Barnes*, 439. { *Jackson v. Sternbergh*, 1 Caines' Rep. 162. *Hammond v. Wadhams*, 5 Mass. Rep. 353.

But the verdict must be manifestly and palpably against the weight of evidence, to authorize the granting of a new trial on that ground. *Palmer v. Hyde*, 4 Conn. Rep. 426. }

A verdict against evidence will not be set aside, and a new trial granted, where the damages do not exceed 5*l*. 1 Taunt. 495. ; and see 2 Blk. 851.

In assumpsit by an executor for goods sold and delivered, the delivery was proved by one witness, but he also swore that he was partner with the deceased, not-

withstanding, from a paper written by himself, the debt appeared to have been due only to the deceased; the jury found a verdict for the plaintiff for 8l. 14s. and notwithstanding the smallness of the debt, a new trial was granted. 1 Smith, 409.

If the best evidence is not produced by him for whom the verdict is, as only a copy of bishop's institution book to prove presentation by the patron in *quare impedit*; for the presentation or the institution book itself might have been produced. But, N. B. in *quare impedit* security must be given for costs and profits of living, if second verdict for the same party. Tillard v. Shebbeare, M. 8 G. 3. 2 Wils. 366.

If a verdict is founded on a note, which is manifestly obtained by fraud, whereas the jury only considered the question of forgery, the court will set it aside, and grant new trial. Bright v. Eynon, T. 30 & 31 G. 2. 1 B. M. 390. { Vide Ward v. Center, 3 Johns. Rep. 271. }

A new trial will not be granted because another jury in a cause nearly similar give a different verdict. 2 Blk. 802.

Or, if he allowed what was not; or denied what was, good evidence. Mod. Ca. 307. 242.

{ If proper evidence be rejected by the judge, a new trial will be awarded. Hunt v. Adams, 7 Mass. Rep. 518.

So, if evidence proper to have been received under one count in a declaration, be rejected, a general verdict having been given for plaintiff, a new trial will be granted. Middlesex Canal v. M'Gregore, 3 Mass. Rep. 124. }

**Replevin for taking cattle**; avowry, damage-feasant; plea, right of common; replication, a custom to inclose, and the lands uninclosed free from his common, and the lands inclosed free from the common of others; if it is proved at the trial, that the inclosed lands are free from common; (though it is said by some witnesses, that if one acre is left uninclosed, he has a right to common on the other's uninclosed lands), if the judge says the custom being entire is not proved, and jury finds in consequence for plaintiff, there shall be new trial for the misdirection. How v. Strode, M. 6 G. 3. 2 Wils. 269.

If sheriff on enquiry has admitted improper evidence, whereby damages lessened, court will order new trial. Barnes, 448.

If defendant in an action for a seizure *sine aliqua probabili causa*, is not permitted to give evidence that there was a probable cause. Bill v. Robinson, M. 1719. Bund. 49.

If on an issue directed to try a *modus* for five closes, it appears that the *modus* extends to two closes more, (for the same sum,) and the judge thereupon directs the jury to find for plaintiff, against the *modus*; a new trial shall be granted. Taylor v. Walker, P. 1729. Bund. 267.

[\*] A nonsuit will not be set aside, on the ground that the case should have been left to the jury, unless that was requested at the trial. 1 Taunt. 10.

A new trial will not be granted for the improper rejection of a witness which, in the event, proved unimportant. 3 East, 451.

An applicaiton for a new trial, because evidence was improperly admitted, will be refused, where the other evidence adduced was sufficient to warrant the verdict. 1 Taunt. 12.

If, on the judge stating his opinion to the jury, the plaintiff elects to be nonsuited, he cannot demand a new trial, on the ground that the direction was erroneous. 3 Taunt. 229.

Where a verdict is consonant to the equity of the case, a new trial will not be granted on a point of law which was not reserved. 1 B. & P. 339.

No motion for a new trial on a point abandoned at the trial. 6 Taunt 336.

If the party was disappointed of evidence by sickness, or other accident, without his default. Mod. Ca. 22.

On the trial of a traverse of an inquisition of lunacy, if the defendant is not well, and cannot attend the trial, a new trial shall be granted. Rex v. Roberts, P. 17 G. 2. Str. 1208.

If the merits have not been tried, because plaintiff could not give material matter

in evidence on the issue joined, and therefore a verdict against him, the court will set it aside, though it was right on the evidence given, and order new trial on payment of costs. *Dayrolles v. Howard*, P. 3 G. 3. 3 B. M. 1385.

A new trial was granted, although there was evidence on both sides, because all the witnesses subscribing to a release were not called and examined. 3 Wils. 38.

If a plaintiff is nonsuited through the mistake of his witness in a material circumstance, a new trial ought to be granted. 2 Anst. 516.

Where the facts upon which the witnesses themselves founded their testimony are falsified by affidavit, a new trial will be granted. 1 B. & P. 427.

In an action on a policy where the defendant by the mistake of his witnesses failed in producing the necessary document from the Admiralty for proving a breach of the convoy act, the court granted a new trial in order to let him into this defence, after verdict found for the plaintiff on the merits. 2 Marshall, 265.

Discovery of new evidence by the attorney of an executor defendant (then absent from England) though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. 2 Blk. 955. Lofft. 160.

Where a cause is undefended through the attorney's neglect to deliver a brief, a new trial will be granted and the attorney compelled to pay all cost as between attorney and client. 3 Taunt. 484.

A new trial will not be granted because the counsel thought it prudent to omit evidence which they had in their briefs. 2 Blk. 802.

Or the witnesses or counsel were absent by surprise. Sal. 645.

Where judgment, though regular, has been obtained by surprise, the court will set it aside; but not, where regular, and no surprise. *Lockwood v. Beaumont*, M. 9 G. 2. B. R. H. 157.

If a verdict is obtained by a trick contrary to conscience, though strictly regular, the court will set it aside, and make the party pay costs, and order new trial; as if plaintiff refuses to produce a note he had received in payment, and which was not paid by his own negligence, because defendant had not given him notice to produce it. *Anderson v. George*, P. 30. G. 2. 1 B. M. 352.

[\*] If there is reason to suspect a verdict to have been obtained by perjury, the court will grant it. *Fabrilus v. Cook*, M. 6 G. 3. 3 B. M. 1771.

If a juror declared a design to give a verdict for one of the parties before the trial. Sal. 645.

Because the jury tossed up, whether 300*l.* or 500*l.* damages. *Mellish v. Arnold*, M. 1719. Bund. 51.

< But where it appeared, that each juror named a particular sum, and all the sums so named, were added together, and the amount divided by twelve, and that the quotient was the amount of damages in which the jury finally agreed, a new trial was refused. *Grinnell v. Phillips*, 1 Mass. Rep. 543. *Cowperthwaite v. Jones*, 2 Dall. 55.

But where a juror permits any conversation with him by others, not of the pannel, relating to the merits of a cause, a new trial will be granted. *Knight v. Freeport*, 13 Mass. Rep. 218. Vide *Blaine's Les. v. Chambers*, 1 Serg. & Rawle, 169. *Willing v. Swasey*, 1 Browne, 123.

So, if the jury receive evidence in a cause, after they have retired from the court. *Thompson v. Mallett*, 2 Bay, 94.

If a juror, through mistake, agree to a verdict against his opinion it is no cause for a new trial. *Commonwealth v. Drew*, 4 Mass. Rep. 399.

Nor will a new trial be granted on the ground of any supposed mistake of the jury, in the assessment of damages; unless the verdict be manifestly against law or evidence. *Hager v. Weston*, 7 Mass. Rep. 110.

Nor will it be granted, where the jury through ignorance, awarded full costs, and so small a sum in damages that full costs could not be allowed, so that the plaintiff, before another jury, might have an opportunity to recover such sum in damages as to entitle him to full costs. *Lincoln v. Hapgood*, 11 Mass. Rep. 358. Vide *Bourke v. Bulow*, 1 Bay, 47. >

Because the jury drew lots, whether to find for plaintiff or defendant, though it happen according to evidence, and the judge's opinion. *Hale v. Cove*, M. 12 G. Str. 642.

If a juror challenged, be sworn on the tales by another name. *Parker v. Thornton*, M. 12 G. Str. 640. 2 Ld. Raym. 1410.

But a verdict whether in a criminal or civil case will not be set aside, because one of the jury was not the party intended. 12 East, 229. Anon. Id. 2312.

The attorney for the defendant being under-sheriff, and having summoned the jury, is no ground for a new trial after a verdict for the defendant, in a case of contradictory evidence. 1 Smith, 304.

Where, in a *qui tam* action for usury, the principal witness, the borrower, had distributed a printed memoir, containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them, held that the discovery of this circumstance after the trial was not a sufficient cause for a new trial. 3 Smith, 321. 7 East, 108.

Subsequent declarations of the jury shall not vitiate a general verdict given according to the merits of the case. 2 Blk. 803.

The subsequent confession of a jurymen to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, not otherwise proved to the court, is no ground for a new trial. 2 Blk. 1299.

In case of a verdict taken in the absence of a party and his solicitor, the court will, in some instances, order a new trial if reasonable cause be shewn. 1 Price, 201.

If on a verdict subject to the opinion of the court on a case stated, sufficient facts are not set forth, or if on a special verdict it is defectively found, the court will grant new trial. *Bond v. Seawell*, M. 6 G. 3. 3 B. M. 1773.

If the judge directs the jury on a point of law, and they find a verdict contrary to his direction; or if he directs them to find specially, and they find a general verdict, there shall be a new trial granted. *Rex v. Poole*, P. 7 G. 2. B. R. H. 23.

A new trial will not be granted because the judge differed from the jury as to the preponderance of the evidence, where on a former trial the verdict was the same. 3 Taunt. 232.

The court will order a new trial on questions deciding important rights, where the judge expressed an opinion on the trial contrary to the verdict, although he afterwards report that he was not dissatisfied with the finding of the jury. 1 Price, 278.

Discovery since the trial that witnesses had been suborned is a ground for a new trial. 3 Burr. 1771.

The court will not, after verdict, arrest a judgment on affidavit that a bill has been found against a witness indicted for perjury, on a material point of evidence given by him on the trial. Nor does it seem that a conviction would be sufficient ground for sending a cause back to a jury for reinvestigation. 2 Price, 3.

But there shall not be a new trial on account of the absence of a witness, whom the party might have had without his neglect. *Mod. Ca.* 22. Sal. 647. F, g. 40.

[\*] New trial is never granted, because evidence, which might have been produced, was not produced. *Cooke v. Berry*, T. 18 G. 2. 1 Wils. 98.

Affidavit that material witnesses were absent, is immaterial to obtain new trial. *Barnes*, 439.

It shall not be granted, where the party might have had the evidence on first trial. *Price v. Brown*, H. 12 G. Str. 691.

< Where a new trial is sought on the ground of newly discovered evidence, it must appear, that the evidence has been discovered since the last trial; or that no laches is imputable to the party; and that the testimony is material. *Vandervoort v. Smith*, 2 Caines' Rep. 155. *Hollingsworth v. Napier*, 3 Caines' Rep. 182. *Palmer v. Mulligan*, 3 Caines' Rep. 307. *Williams v. Baldwin*, 18 Johns. Rep. 489. Vide *Bond v. Cutler*, 7 Mass. Rep. 205. *Niles v. Brackett*, 15 Mass. Rep.



378. *Moore v. Philadelphia Bank*, 5 Serg. & Rawle, 41. *Knox v. Work*, 2 Binn. 582. *Aubel v. Ealer*, 2 Binn. 582. *in nota*. *De Lima v. Glassell's Adm.* 4 Hen. & Munf. 369. *Drayton v. Thompson*, 1 Bay, 261. *State v. Harding*, 2 Bay, 267.

A new trial may be granted in a feigned issue out of chancery, for newly discovered evidence. *Doe v. Roe*, 1 Johns. Cas. 402.

A new trial will not be granted on the discovery of new evidence tending merely to impeach the character of a witness, who testified on the former trial. Such evidence is not material. *Shumway v. Fowler*, 4 Johns. Rep. 425. *Halsey v. Watson*, 1 Caines' Rep. 24. *Bunn v. Hoyt*, 3 Johns. Rep. 255. *Duryce v. Dennison*, 5 Johns. Rep. 248. *Jackson v. Kinney*, 14 Johns. Rep. 186. *Commonwealth v. Waite*, 5 Mass. Rep. 261. *Hammond v. Wadhams*, 5 Mass. Rep. 353. *Commonwealth v. Drew*, 4 Mass. Rep. 399.

Nor will it be granted on the ground of mistake or surprise, after a witness has been examined and cross-examined. *Steinbach v. Columbian Ins. Co.* 2 Caines' Rep. 129.

Nor on the ground of newly discovered evidence which is merely cumulative. *Steinbach v. Columbian Ins. Co.* *at supra*. *Smith v. Brush*, 8 Johns. Rep. 65. 2d edit. *Pike v. Evans*, 15 Johns. Rep. 210.

But in the State of New-York, it has been held, that in ejectment relative to the military bounty lands, where the principal point in issue, was as to the identity of the original patentee, each party claiming under a person of the same name, a new trial may be granted to let in newly discovered evidence as to the identity of such patentee; though such evidence consisted of cumulative facts relating to the same point which was the subject of controversy at the former trial. *Jackson v. Crosby*, 12 Johns. Rep. 354. >

If a plaintiff recovers upon a contract, which though illegal, in fact is legal upon the face of it, from the defendant having neglected at the trial to prove the circumstances which rendered it illegal, the court will not grant a new trial to let in such proof. 1 T. R. 84.

After a verdict for the plaintiff, in an action for negligence, a new trial will not be granted on the ground, that the accident probably resulted in part from the plaintiff's own negligence. 3 Taunt. 1.

Nor after two verdicts for the same party, without proof of practice. Mod. Ca. 22.

It may be granted for excessive damages, but not a third trial. *Chambers v. Robinson*, H. 12 G. Str. 691. Note, This case was denied to be law by Pratt C. J. *Beardmore v. Carrington*, P. 4 G. 3 2 Wils. 244.

Where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by rule or practice to a third trial. 2 Blk. 963.

A new trial may be granted after two concurring verdicts. 4 Burr. 2108.

Nor upon an indictment or information, where the defendant is acquitted, though contrary to the direction of the judge, without proof of practice. Sho. 336. Sal. 646. 1 Lev. 9. 1 Sid. 153.

New trial shall not be granted, if defendant is acquitted on indictment for not repairing highway. *Rex v. Silverton*, P. 24 G. 2. 1 Wils. 298.

The rule that a new trial will not be granted in a criminal case where the defendant has been acquitted, (4 Burr. 2257. Loft. 891.) admits no exceptions; it applies, therefore, to the case of an indictment for a nuisance. 4 M. & S. 337.

New trial may be granted in a criminal case, on report of the judge and affidavits of the jury, that the verdict against the defendant was taken contrary to their meaning, and to the judge's directions in point of law. *Rex v. Simmons*, T. 25 & 26 G. 2. 1 Wils. 329.

A new trial, after conviction, may be granted, unless where the crime is higher than a misdemeanor. 6 T. R. 619.

After a conviction of an offence less than felony, the court of king's bench will, in its discretion, grant a new trial whenever it is manifestly conducive to the ends

of justice. In strictness, the defendant should apply within the time limited in civil cases; but for the attainment of substantial justice, the court will interpose after the regular time has elapsed. 1 East, 143.

Where an indictment against several, unless for a crime higher than a misdemeanor, some are acquitted, the others found guilty, a new trial as to those convicted may be granted. And it seems that the entry on the record may be either, 1. Altering the first *venire* by striking out the names of those defendants who were convicted, and then awarding a second *venire* to try them; or 2. By stating, that the verdict against these was improperly given and then to award a new trial so far as respects them. 6 T. R. 619.

If, in a criminal proceeding, some evidence be adduced which should have been excluded, and a verdict pass against the defendant, a new trial will be granted; since there are no means of ascertaining whether the other portion of evidence alone weighed with the jury, or whether they were not influenced by that improperly adduced. 4 M. & S. 532.

< Where a juror has been withdrawn, by order of the court, in an indictment for a misdemeanor, the delinquent is not to be discharged, but must be tried a second time. *People v. Denton*, 2 Johns. Cas. 275. *People v. Olcott*, 2 Johns. Cas. 301.

So, if the jury cannot agree, in a criminal case, as well of felony, as of a misdemeanor, they may be discharged, and the prisoner may be tried by another jury. *People v. Goodwin*, 18 Johns. Rep. 187.

So, in an indictment for murder, if the judgment be arrested, or reversed, a new trial may be had. *People v. M'Kay*, 18 Johns. Rep. 212. >

Nor where the action is rigorous, as for not taking care of his fire, &c. Sal. 644. 648. 653. R. 5 Mod. 88.

[\*] A new trial will not be granted in a hard case. 3 Burr. 1306.

Although a verdict is against evidence, yet if the action was frivolous and vexatious, and the real damage small, the court will not grant new trial; which should be to attain real justice, not to gratify litigious passions on every point of *summum jus*. *Macrow v. Hull*, M. 30 G. 2. 1 B. M. 11. *Farewell v. Chaffey*, M. 30 G. 2. 1 B. M. 3. *Burton v. Thompson*, M. 32. G. 2. 2 B. M. 664.

On a hard case on *qui tam*, where officers of revenue will not prosecute, the court will not grant new trial, though verdict against evidence and judge's direction. *Barnes*, 435.

No new trial in a *qui tam* after verdict for defendant, though against the judge's directions. *Seymour v. Day*, P. 4 G. 2. Str. 899. *Jervois v. Hall*, P. 16 G. 2. 1 Wils. 17. *Barnes*, 466.

New trial is never granted on penal statute, if verdict for defendant, if no misbehaviour appears in him. *Mattison v. Allanson*, M. 19 G. 2. Str. 1238.

After a verdict for defendant in a penal action, a new trial shall never be granted. 3 Wils. 59.

In a penal action, where the jury having had the case fairly stated to them, find a verdict for the defendant, however mistaken, the court will not grant a new trial. *Secus*, where they have been misdirected. 4 T. R. 753. 5 T. R. 19.

A verdict for the defendant in a penal action will not be set aside because against evidence. 10 East, 268.

It may be granted on an information of seizure for fraudulent exportation, where verdict is for defendant, where nothing is forfeited but the goods. *Robinson v. Leques*, T. 1728. Bunb. 253.

If master brings trespass *vi et armis* for taking his apprentices, and it appears that the apprentices being imprisoned by their master in a lock-up-house of A. and fearing to be sold to Guinea, complain to quarter-sessions, who discharge them; and W. a sea lieutenant agrees with them to serve, gives A. money to keep them that night, and next morning sends press-gang with a note to A. to deliver them, which he does, taking a receipt; and on trial all the defendants (the justices and W.) are found not guilty; although W. ought to have been found guilty on the evi-

dence, yet as he appeared to act with good intention, the court will not grant new trial. *Reavely v. Mainwaring*, H. 2 G. 3. 3 B. M. 1306.

In an action for a malicious prosecution, the court refused to set aside a verdict for the defendant, though against evidence. *Cowp.* 37.

Nor after an indictment for a capital offence. *Vide supra.*

Or for perjury, though the witnesses were absent by practice. 1 *Sid.* 149, 153.

Or in *quo warranto*, where the defendant is acquitted. *Dub.* 2 *Mod.* Ca. 207.

If on information *quo warranto*, where there are many issues, the jury find a general verdict for the king, and the judge reports that two of the issues were found against evidence, a new trial shall be granted; there should be a separate verdict upon each issue. *Rex v. Cockerell*, T. 11 & 12 G. 2. *Andr.* 260.

On an information in the nature of *quo warranto*, verdict for defendant, the judge certified it was against evidence. Motion for new trial; but the 12 judges equally divided, and no new trial could be granted. *Rex v. Bennet*, T. 4 G. *Str.* 101.

In *quo warranto*, to which defendant pleads an election under the nominations of B. and A. bailiffs, it is no cause for a new trial, that the judge directed a judgment of *ouster* in *quo warranto* against B. and A. for acting as bailiffs; especially if judgment of *ouster* must have been judgment of *ouster* against [\*]defendant, though this issue had not been against him. *Rex v. Hebden*, P. 12 G. 2. *Andr.* 388.

A new trial will be granted in an information in nature of *quo warranto*, after verdict for prosecutor. 4 *Burr.* 2135.

An information in the nature of *quo warranto*, is now considered merely a civil proceeding; therefore a new trial therein may be granted after verdict for the defendant. 2 *T. R.* 484.

< In an information, in nature of a *quo warranto*, charging the defendant with having usurped the franchises of an office, a new trial ought not to be granted, for a misdirection, where it appeared, that the term of the office had expired, and a new annual election of officers had been made. *State v. Tudor*, 5 *Day*, 329. >

It shall not be in an inferior court. *Sal.* 650.

An inferior court cannot grant a new trial. *Doug.* 380.

Nor shall be for want of notice, if the defendant made a defence. *Sal.* 646.

Nor shall be, where the verdict is with the right. *Sal.* 644. 646. 647.

Verdict shall not be set aside for smallness of damages, though it may for excessive damages. *Hayward v. Newton*, M. 6 G. 2. *Str.* 940. *Barker v. Dixie*, T. 9 G. 2, *Str.* 1051. *B. R. H.* 279. *Barnes*, 445.

But inquisition was set aside, and new inquiry granted, for smallness of damages. *Tutton v. Andrews*, T. 14 & 15 G. 2. *Barnes*, 448.

And in such case it may be granted, though a special verdict has been signed by the counsel on both sides. *Namink v. Farwell*, M. 1719. *Bunb.* 51.

If the demand is certain, court will set aside damages if too small, not where uncertain. *Barnes*, 455.

The court will not grant new trial for excessive damages, where they depend on circumstances solely under the cognizance of a jury, and fit for their decision; as for criminal conversation with plaintiff's wife. *Wilford v. Berkeley*, T. 31 G. 2. 1 *B. M.* 609.

N. B. This rule is not here extended to torts in general, though so quoted by Lord Camden, in *Beardmore v. Carrington*, 2 *Wils.* 244.

New trial was never granted for excessive damages in torts, yet it might, if damages such as all mankind would exclaim at, at first blush. *D. per Lord Camden*, *Huckle v. Money*, M. 4 G. 3. *Beardmore v. Carrington*, P. 4 G. 3. 2 *Wils.* 205. 244.

The court will not even grant a rule to shew cause for new trial for excessive [\*227]

damages, if the judge who tried it says, though he thinks the damages too large, yet he is not dissatisfied with the verdict; as 200*l.* for custom-house officers searching for prohibited goods, and finding none, but doing no damage. *Redshaw v. Brooke*, P. 9 G. 3. 2 Wils. 405.

Though judge certifies damages excessive, yet if court think otherwise they will not grant new trial. Thus, on action for very malicious prosecution on which plaintiff had been imprisoned and tried for felony, Page J. certified 50*l.* damages excessive, but the court thought not. *Barnes*, 436.

{ In actions of slander, libel, &c. the court will not grant a new trial, on the ground of excessive damages, unless the amount be so enormous, as manifestly to shew, that the jury must have been actuated by passion, partiality, prejudice, or corruption. *Coleman v. Southwick*, 9 Johns. Rep. 45. *Southwick v. Stevens*, 10 Johns. Rep. 443. But vide *M'Connel v. Hampton*, 12 Johns. Rep. 284. *cont. ut semb.* *Coffin v. Coffin*, 4 Mass. Rep. 41. *Cowperthwaite v. Jones*, 2 Dall. 55. *Sommer v. Wilt*, 4 Serg. & Rawle, 19. *M'Rea v. Woods*, 2 Wash. 80. *Neal v. Lewis*, 2 Bay, 204. *Chancellor v. Vaughn*, 2 Bay, 416. }

In trespass, not guilty to part, and justification to part, merits on justification for plaintiff, and damages; on not guilty, no evidence; general verdict not set aside. *Barnes*, 154.

On two issues, general verdict, right as to one, contrary to evidence on the other, cannot be severed, nor new trial granted. *Barnes*, 436.

If title is in dispute, and verdict for defendant, no new trial unless revenue concerned. *Barnes*, 440.

If there is evidence on both sides, it cannot be called a verdict against evidence; and there shall not be new trial, though the jury found against the party with whom the judge thinks the weight of evidence lies, or for whom he sums up. *Ashley v. Ashley*, *Smith v. Huggins*, M. 14 G. 2. Str. 1142. *Anon. T.* 16 G. 2. 1 Wils. 22. { Vide *Ward v. Center*, 3 Johns. Rep. 271. *Hammond v. Wadhams*, 5 Mass. Rep. 353. }

In debt on bond, conditioned to pay to a third person A., if on trial there is evidence that A. declared there was nothing due to him, there shall not be a [\*] new trial on affidavit of A. that he looked on defendant as indebted to plaintiff the obligee; for A. is the real plaintiff, and his declaration good evidence. *Hanson v. Parker*, H. 23 G. 2. 1 Wils. 257.

Two hundred pounds damages for a blow in the face, to plaintiff who called defendant scoundrel for detaining his turtle; not excessive, and new trial refused. *Grey v. Sir Alexander Grant*, T. 4 G. 3. 2 Wils. 252.

A militia colonel orders an innocent soldier twenty lashes, out of spite to the major, who had given him a furlough; the court will not order new trial, because 150*l.* is given for damages, though the man was scarcely hurt. *Benson v. Frederick*, H. 6 G. 3. 3 B. M. 1845.

After a full trial by a competent jury, if no fresh light can be thrown in, a new trial shall not be granted. 1 Blk. 418.

A new trial will not be granted where the court see that the issue of the second trial will be similar to that of the first. 2 T. R. 275.

Where a verdict is consonant to equity, a new trial will not be granted, unless on a legal objection; not, therefore, on the ground that the facts proved did not sufficiently warrant the inference drawn by the jury. 4 T. R. 459.

In trespass the defendant prescribed for a way over the close in which, &c. and mistook the *terminus a quo* in his plea; there was a verdict for the defendant; new trial refused, the merits having been tried. 3 Wils. 272.

In case, for maliciously suing and arresting plaintiff in an inferior court, which had not jurisdiction, and verdict for plaintiff, there shall not be new trial, though the declaration is faulty, in not alleging that defendant knew that the court had not jurisdiction. *Goslin v. Wilcock*, P. 6 G. 3. 2 Wils. 302.

Nor after an interlocutory judgment. Mod. Ca. 264.

New trial cannot be granted on the crown side, after signing interlocutory judgment. *Rex v. Armstrong*, M. 12 G. 2. Str. 1102.

If the plaintiff is nonsuited, and the nonsuit recorded, there cannot be a new trial, for the plaintiff is out of court. *Serle v. Ld. Barrington*, M. 11 G. 2 Ld. Raym. 1370.

Nor usually in an action for words. Sal. 644.

Yet it is said, in an action for words, (*Lord Gower v. Heath*, T. 13 G. 2. Barnes, 445.) that for excessive damages verdicts have been frequently set aside. In *Redshaw v. Brooke*, P. 9 G. 3. 2 Wils. 405. it was not argued nor denied on this ground, but because *Wilmot, C. J.* was not dissatisfied with the verdict. The same doctrine is asserted in *Wilford v. Berkeley*, T. 31 G. 2. 1 B. M. 609., and in *Benson v. Frederick*, H. 6 G. 3. 3 B. M. 1845. where *Aston, J.* cites *Wood v. Gunston*, Style, 466. So also, in *Grey v. Grant*, T. 4 G. 3. 2 Wils. 252. So, *Anon.* M. 7 G. 2. Barnes, 436. *Chisvers v. Lambert*, M. 8 G. 2. Barnes, 229. *Yate v. Swaine*, M. 15 G. 2. Barnes, 233. where inquiry set aside for excessive damages, viz. 250*l.* for 26 days false imprisonment. It is said *per curiam*, in *Beardmore v. Carrington*, that the court may assess damages themselves without writ of inquiry. Q. Can they do it in trespass, trespass in the case where defendant pleads not guilty, or in any case where the demand is not certain on the record? Vide *infra*, Z 1.

If the jury find that words directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict be recorded for the defendant, the court will not grant a new trial, on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had accidentally been the cause of his brother's death. 2 Price, 282.

[\*]Or ejectment. Sal. 648.

If plaintiff in ejectment moves against the casual ejector on the stat. 4 G. 2. c. 28. that there is half a year's rent due, and no distress, and at the trial deserts that, and sets up another title; yet if defendant makes defence, there shall be no new trial. *Kempton v. Cross*, P. 8 G. 2. B. R. H. 108.

A new trial may be granted in ejectment. 4 Burr. 2224. 1 Blk. 346.

Nor after a motion in arrest of judgment. Sal. 647.

Or a trial at bar. R. Sal. 650. 643. 2 Jon. 225. Carth. 507.

After trial at bar, if the evidence is doubtful, a new trial shall not be granted. *Smith v. Parkhurst*, H. 12 G. 2. Andr. 315. Str. 1105.

New trial shall not be granted after trial at bar in ejectment, unless justice is not otherwise to be attained. *Smith v. Parkhurst*, H. 12 G. 2. Str. 1105. Andr. 315.

On a trial at bar on a traverse to the return of a *mandamus*, a new trial at bar may be granted if the verdict was against evidence. *Musgrave v. Nevinson*, P. 10 G. 2 Ld. Raym. 1358. Str. 584. *Smith v. Parkhurst*, H. 12 G. 2. Str. 1105.

Motion for new trial must be within the first four days of term. Barnes, 446.

The court will, under particular circumstances, permit a motion for a new trial to be made, though the four days be elapsed. 1 Blk. 664.

The court will grant a new trial under particular circumstances, after the four days are elapsed, Doug. 171.; and at any time before judgment. Doug. 797.

The rule, confining a motion for a new trial to the four first days of the term, applies as well to criminal as civil cases; but if in the course of an address in mitigation of punishment or otherwise, it appear that justice has not been done, the court will of themselves interpose, and grant a new trial. 5 T. R. 432. 1 East. 143.

Two days notice to be given of motion for new trial. C. B. Mich. 53 G. 3. 4 Taunt. 721.

No motion for a new trial, unless the court is certified that the judge has had due notice. 5 Taunt. 86.

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The certificate of the judge reporting the matter of fact, as appearing before him at the trial, is conclusive. *Rex v. Poole*, P. 7 G. 2. B. R. II. 23.

The court will not, on a motion for a new trial, hear the affidavit of any facts which might have been brought forward at *nisi prius*. 1 Price, 113.

Where there is a doubt upon the judge's report as to what passed at the time of bringing in the verdict, the affidavit of jurors or bye-standers may be received upon a motion for a new trial, or to rectify a mistake in the minutes. 5 Burr. 2667.

A motion for a new trial must be discussed on the line taken by the leading counsel at the trial, though contrary to the opinion of the junior. 4 Taunt. 779.

If no one appear to shew cause against a rule *nisi* for a new trial, on the peremptory order day, the rule will be made absolute. 1 Price, 312.

On moving for a new trial in a criminal case, all convicted must be present in court. 11 East, 307.

New trial shall not be granted, because of variance between paper-book, and the record, the record being right. *Barnes*, 475.

It shall not be granted for variance between the paper-book, in which plaintiff is called *James*, and the record, in which he is rightly called *John*; or because the word *not* is omitted in not regarding his promises. *Mathar v. Brinker*, P. 4 G. 3. 2 Wils. 243.

[\*]If the merits have not been tried, court will grant new trial for variance between issues delivered and record, though not material. *Barnes*, 464.

Defendant pleads four pleas, plaintiff joins issue on three, taking no notice of fourth, and verdict for him, he shall reply issuably or demur; if he replies, new trial; if he demurs, proceedings stayed till argument. *Barnes*, 465.

If defendant pleads in abatement, to which plaintiff demurs, and judgment of *respondeas ouster*, then he pleads *nil debet*, and the plea-roll contains nothing but the declaration and *nil debet*, the plea in abatement not having been deserted, or judgment entered on it, this irregularity is cured by defendant's having accepted and paid for the issue, and the court will not grant new trial. *Combo v. Pitt*, P. 5 G. 3. 3 B. M. 1632.

An objection to the competency of a witness must be made at the trial, and a new trial will not be granted, because it has since been discovered that the witness was interested, though that fact may have some weight with the court, where the party shews that he has merits. 1 A. R. 717.

Where there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. 1 Blk. 929.

Where a plaintiff refuses, against the opinion of the judge, to be nonsuited, and has a verdict, a new trial shall be without costs. 1 Blk. 670.

Where a plaintiff submits to an erroneous nonsuit, a new trial shall be without costs. 1 Blk. 670.

There is no rule against giving costs, on a new trial being granted, although the verdict was against the opinion of the judge. 1 Anst. 47.

A rule for a new trial, upon grounds not opened at the former trial, will be made absolute, only on payment of costs. 1 T. R. 18.

Where in a rule for a new trial, nothing is said about the costs of the former, the costs of the first trial are never allowed in king's bench, although the second trial terminate in favour of the same party as the first. *Doug.* 438. 3 T. R. 507. 6 T. R. 71. 131. 144. 8 T. R. 619. 1 East, 111. 10 East, 416.

Where a case reserved, is sent down to be restated, the party succeeding at the second trial is not entitled to the costs of the first. 6 T. R. 71.

Where a case reserved is sent down to be restated, and the defendant without going to trial, gives a *cognovit*, the plaintiff is entitled to the costs of the first trial. 6 T. R. 144.

Where, upon setting aside a nonsuit, the costs are directed to abide the event, although the plaintiff succeed on the second trial, he is not entitled to the costs of

the first, nor is the defendant. But, in case where the costs are directed to abide the event, the same party succeeds on both trials, he is entitled to the costs of both. 3 T. R. 619. 2 N. R. 382.

In the C. B. where a cause has been twice tried, and the same party who succeeded on the first trial gains a verdict also upon the second, he is allowed the costs of both trials, although the rule for the second trial be silent as to the costs of the first. But where the first verdict is for the plaintiff, and the second for the defendant or *converso*, there the party ultimately succeeding has not the costs of the first trial, even though the rule direct that the costs of the former trial shall abide the event. 1 H. B. 639. Id. 641. 2 N. R. 382.

Where upon a second trial, a juror is withdrawn, on the party who obtained the verdict at the first trial undertaking generally to pay the other party his costs; such an undertaking extends only to the costs of the second trial. 1 H. Bl. 639.

Costs of first trial gained by the defendant's forgery, refused to plaintiff succeeding on second trial. 4 Taunt. 671.

Where the jury find an insufficient verdict, upon which the court can give [\*] no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. 2 Mars. 475.

If a cause come on for trial, and be referred, and the arbitrator's award in favour of the plaintiff should afterwards be set aside, so that in consequence the cause be subsequently tried, the plaintiff, if he should also succeed on that occasion, will be allowed the costs of the former trial. 1 Price, 310.

When on discussing a rule nisi for a nonsuit after verdict, for a total loss, the court determine that the verdict is wrong, but the plaintiff is entitled to a return of premium; neither party can claim the costs of the rule. 3 Taunt. 406.

It seems, where a special case has been reserved, a new trial has been granted without previously setting aside the verdict. Lofft. 451.

Rule as to entering rules for new trials which stand over from one term to another in the peremptory paper. K. B. Hil. 44 G. 3. 1 Smith, 198.

If cause tried before judge of another court, there must be affidavit of what passed on trial. Barnes, 447.

Where the court of chancery directs an action at law, even in cases where such action could not be maintained without its direction, as where the defendant therein is a certificated bankrupt, it does not consider the action as tried, unless the court at law is satisfied with the verdict. Until that event, therefore, such court has full dominion over the suit, and may direct a new trial, if dissatisfied with the verdict. 4 M. & S. 192.

A new trial, in an issue out of chancery, must be first moved for in that court, though the motion be founded on an improper rejection of evidence. 6 Taunt. 444.

If verdict for plaintiff, and court divided on motion of new trial, plaintiff may sign judgment. Barnes, 442.

There shall not be a new trial after four years acquiescence, though judgment is not signed. Rex v. Bill, M. 8 G. 2. Str. 995.

Where on trying a traverse on a return, no damages are given, it cannot be supplied by a writ of inquiry, but there must be a *venire facias de novo*. Kynaston v. Shrewsbury, T. 9 G. 2. Str. 1051. B. R. H. 147.

A *venire de novo* can only be awarded where the verdict is defective, so that no judgment can be given. 7 T. R. 43.

Where entire damages are assessed upon the whole declaration, and some counts are defective, a *venire de novo* will not be awarded, and therefore the judgment will be arrested. 6 T. R. 691. See Doug. 377.

The successful party on a *venire de novo* is only entitled to the costs of the last trial. 6 T. R. 131.

< If, on making up a special verdict, a fact be omitted by mistake, a *venire de novo* will be ordered to ascertain such fact, unless the opposite party will consent to amend the verdict by inserting it. Watson v. Delafield, 1 Johns. Rep. 150.

So, if there be two issues in fact, and the verdict answer to one only, a venire *de novo* will be awarded. *Hite's heirs v. Wilson*, 2 Hen. & Munf. 268.

If the jury, on a second trial, find a verdict contrary to the opinion of the court, on a matter of law, determined by the court, on granting a new trial, a third trial will be granted. *Silva v. Low*, 1 Johns. Cas. 336. Vide *Mitchell v. Mitchell*, 4 Binn. 180. *Commissioners of Berks v. Ross*, 3 Binn. 520. *Meore's Admrs. v. Cherry*, 1 Bay, 267.

But where there has been two verdicts for plaintiff, on a matter of fact a third trial will be refused. *Talcot v. Commercial Ins. Co.* 2 Johns. Rep. 467. Vide *Barrett v. Rogers*, 7 Mass. Rep. 301. *Burkart v. Bucher*, 2 Binn. 467. *Keble v. Arthurs*, 3 Binn. 26.

Where the verdict is uncertain, a new trial will be granted. *Jackson v. Malin*, 15 Johns. Rep. 293.

Sometimes, a new trial will be granted on the ground of surprise. As where a party has reason to suspect, that the witnesses produced against him, have sworn falsely. *Peterson v. Barry*, 4 Binn. 481.

On a mere affidavit of merits, the court will not set aside a regular verdict, and grant a new trial. *Galliland v. Morrell*, 1 Caines' Rep. 154.

So, where a party goes to trial on a bad plea, the verdict cannot be set aside, on the ground that the judge admitted evidence which was not pertinent to the issue, *Meyer v. M'Lean*, 1 Johns. Rep. 509.

A new trial will not be granted for a misdirection, where the damages are merely nominal, or so small that the plaintiff would be liable to pay costs to the defendant. *Fleming v. Gilbert*, 3 Johns. Rep. 528. *Hunt v. Burrell*, 5 Johns. Rep. 137. Vide *Brantingham v. Fay*, 1 Johns. Cas. 255.

But where, in an action for a very outrageous assault, the jury gave only one dollar damages, a new trial was granted. *Bacot v. Keith*, 2 Bay, 466.

A new trial will not be granted, in ejectment, on the ground that the plaintiff gave evidence of an undivided moiety only, and a general verdict taken. *Jackson v. Van Bergen*, 1 Johns. Cas. 101.

In doubtful cases, where the questions are fairly submitted to the jury, new trials will not be granted. *Woodard v. Paine*, 15 Johns. Rep. 493.

A new trial will never be granted, when the ground of the application rests upon the negligence of the party. *M'Dermott v. United States Ins. Co.* 3 Serg. & Rawle, 604.

A new trial will not be granted in certain cases where the party has another remedy; as assumpsit, for money had and received, writ of error, &c. yet it would be otherwise, if the party be remediless. *Penniman v. Tucker*, 11 Mass. Rep. 66. *Hart v. Huckins*, 5 Mass. Rep. 260. *Dwyer v. Brannon*, 6 Mass. Rep. 339. *Pearl v. Rawdin*, 5 Day, 244. *Minor v. Mead*, 3 Conn. Rep. 289. *Beers v. Broome*, 4 Conn. Rep. 247.

So, an act of the judge, relating to any matter entirely within his discretion, is not a ground for a new trial. *Alexander v. Byron*, 2 Johns. Cas. 318.

But, it seems, that in certain cases, an erroneous exercise of discretionary power, may lay the foundation for a new trial. *Mercer v. Sayre*, 7 Johns. Rep. 306.

If before verdict, a party discover, that one of the jurors had made up his mind against him, the matter must be immediately represented to the court; and if the party choose to run the hazard of a verdict, he cannot afterwards move for a new trial. *M'Corkle v. Binns*, 5 Binn. 340.

And, generally, a new trial will not be granted on a point of law not made at the trial. *Peters v. Phoenix Ins. Co.* 3 Serg. & Rawle, 25. >

### (R 18.) When there shall be a repleader.

If an issue is misjoined, or joined on an immaterial point, &c. when it is not aided by the st. 32 H. 8. a repleader shall be awarded. *Cro. El.* 883.

R. 1 Lev. 32. 2 Mod. 137. 140. { Vide *Stafford v. The Mayor, &c. of Albany*, 6 Johns. Rep. 1. }

As, if plaintiff declares on a lease to A. which he says is come by assignment to defendant, and he pleads that A. did not assign to him, and issue is joined, there shall be a repleader; for it is an immaterial issue. *Enys v. Mohun*, M. 3 G. 2. Str. 847.

Or, if a bond is conditioned for payment of money, on or before 5th of December, and defendant pleads payment on 5th of December, and plaintiff replies, and verdict for plaintiff, there shall be a repleader; for it is an immaterial issue. *Tyron v. Carter*, M. 8 G. 2. Str. 994.

But although an issue is immaterial, yet a repleader shall not be granted, if the cause can be ended more expeditiously; as, if the plea be ill, or good in form though not in fact, and amounts to confession. *Rex v. Phillips*, M. 7 G. Str. 394.

[\*]So, if the issue joined is nugatory and void, whereon the court cannot give judgment, there shall be a repleader. R. Mod. Ca. 2. Hard. 331.

When the finding on an issue does not determine the right, the court ought to award repleader, unless it appears from the record that no manner of pleading the matter could avail. *Rex v. Philips*, P. 30 G. 2. 1 B. M. 292.

If there is a mistake in a plea, (as, if a mayor sets forth his being sworn in according to the charter, when in fact he was sworn in on a *mandamus*, according to 11 G. 1. c. 4.) and several issues taken by the replication to one entire defence, all which are found against defendant, as he could not give in evidence the true and proper manner of his being sworn in, on this plea; the court may order the whole verdict to be set aside, with costs, and liberty to amend the plea. *Ibid.*

So, if the issue is concluded to the country, where it should be to the record, &c. or *e contra*. R. 1 Leo. 90. { Vide *Stafford v. The Mayor, &c. of Albany*, 6 Johns. Rep. 1. }

There shall be a repleader of a bar, replication, or rejoinder, which is bad; for at the first defect the repleader begins. Ray. 458. (Vide *Cowp.* 510.)

By the common law, if an immaterial issue was joined, the court might award a repleader before trial. Mod. Ca. 20. Sal. 579.

But will not now, where the issue joined will be aided by the statutes of jeofail. R. Mod. Ca. 3. Sal. 579.

Nor, in any case but where complete justice may be answered. *Cowp.* 510.

So, there shall not be a repleader where the trespass is confessed, though the issue was immaterial. 1 Sal. 173.

And there may be a repleader after a verdict. *Cro. El.* 883. Hard. 331.

But it is doubted whether a repleader ought to be granted when the issue is found against the party tendering it. *Doug.* 396.

But generally there shall be no repleader upon a demurrer. 1 Leo. 79. without the consent of the parties. Per two J. Rol. 271. Mo. 461. Agr. Mo. 867. Latch, 147. Adm. 2 Lev. 142. Cont. allowed, 3 Lev. 440. Per Powel, Mod. Ca. 102. R. Sav. 89. 2 Bul. 37.

Yet, if there be a bad bar, and a bad replication, a repleader may be awarded upon a demurrer. Bro. Replead. 39. But Periam said, the roll of that case could not be found. R. Pl. Com. 133. a. But Periam said, that there it was by consent. 1 Leo. 79. Acc. Per three J. Periam cont. 1 Leo. 79. But in the same case it is doubted. Sav. 89. Semb. *Cro. El.* 313. 1 And. 167.

So, there shall be no repleader, where, by the defect in joining issue, there is a discontinuance. R. Mod. Ca. 3.

Or, the defendant made default at the trial, whereby he is out of court. R. 1 Sal. 216. 2 Sal. 579.

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After inquest is taken by default defendant cannot be received to make suggestion on the roll; for after default there can be no repleader. *Brampton v. Crabb*, H. 3 G. Str. 46.

In debt on bond, if defendant pleads payment before the day under a *scilicet*, there shall not be a repleader. *Cowne v. Barry*, M. 7 G. 2. Str. 954.

There shall be no repleader where defendant pleads payment and acceptance [\*] in satisfaction of debt on bond, and plaintiff takes issue on the acceptance. *Hackshaw v. Rawlings*, H. 3 G. Str. 23.

If issue be joined in Chancery, and the record sent into B. R. to be tried, for a defect in the *venire facias*, a repleader shall be awarded in B. R. and not in Chancery; for the record being in B. R. can never be remanded. R. 1 Rol. 287.

So, anciently a repleader was awarded upon a writ of error; but this is now obsolete. Per Hale, 2 Sand. 319. 2 Lev. 12.

If a repleader be awarded or denied, when it should not be, it will be error. R. Mod. Ca. 2. Sal. 579.

If a repleader is awarded, the judgment is *quod replacitent*, and the fresh pleading begins where the first defect was. R. Mod. Ca. 2. Sal. 579.

There shall be no costs on a repleader. *Ibid.*

{ A repleader ought not to be awarded, though the issue be immaterial, if it appear from the record that if the plea had been properly pleaded, the decision of the issue must have been the same. *Henderson v. Foote*, 3 Call, 248.

So, in a writ of right, after verdict, if no issue be joined, a repleader will be awarded. *Taylor v. Huston*, 2 Hen. & Munf. 161.

So, in case for slander: As where the defendant pleaded the word "justification" only, and a general replication, and verdict for the defendant, a repleader was awarded: but a verdict for plaintiff would not be set aside, it being a rule that a repleader is not grantable to the party who is guilty of the first fault in pleading. *Kirtley v. Deck*, 3 Hen. & Munf. 388. Vide *Kerr v. Dixon*, 2 Call, 379.

So, if the defendant be sued as heir and devisee, and plead, "that he hath no assets by descent;" on which the plaintiff takes issue, and verdict for the defendant, a repleader will be awarded. *Baird & Co. v. Mattox*, 1 Call, 237. }

## (S) VERDICT.

### (S 1.) General.

A verdict is general or special. Co. Lit. 226. b.

A general verdict is, when the jury find the point in issue generally: as, in assise on *nul tort*, *nul disseisin*, that the tenant *disseisivit* or *non disseisivit*. Co. Lit. 226. b.

If the plaintiff is nonsuited, and the jury find damages; as, in replevin; it is no verdict, but only an inquest of office. R. Cro. El. 412.

### (S 2.) Special.

A special verdict is, when the jury find the special matter, and thereupon pray the discretion of the court. Co. Lit. 226. b.

On a point reserved for opinion of court, the verdict must always be for plaintiff. *Barnes*, 455.

The rule should be, if the opinion of the court is for plaintiff, that the *postea* be [\*233]



delivered to him; if for defendant, that verdict be entered for him *ex assensu juratorum*. Barnes, 451.

A special verdict may be found in all cases, as well upon indictments and appeals as upon commons. Co. Lit. 227. a. R. 9 Co. 13, 14. Dowman.

In all actions, real, personal, or mixt. R. 9 Co. 13, 14.

On all issues joined between the king and the subject, as well as between party and party. Ibid.

And upon any issue joined on a special matter, or point collateral, as well as on the general issue. R. cont. Dy. 284. a. R. acc. per all the J. in B. R. and the opinion in Dyer denied. 9 Co. 14. Dowman. Cont. 3 Leo. 48. R. acc. Mo. 858.

So, by consent a special verdict may be determined by the court, without being filed upon record. Mo. 774.

But if the jury find a special matter not pertinent to the point in issue, the court may disallow the verdict, and the case must be understood to be such in the books, where the court disallows a special verdict. 9 Co. 14. a.

[\*]As in trespass for a thing transitory in A. if the defendant is found not guilty in A.; for the jury ought to say not guilty generally, or find the special matter. 2 Rol. 694. l. 25.

In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of the facts only, 3 T. R. 198.; thus, in trespass on a copyhold, it is not enough to state that admission of plaintiff was proved, but must state that plaintiff had title or possession. Palmer v. Johnson, P. 3 G. 3. 2 Wils. 163.

< It is not improper for the jury, in a special verdict, to state matter merely formal, and which was not controverted at the trial. Sleght v. Hartshorne, 1 Johns. Rep. 149.

In a special verdict, the jury ought not to find the evidence and submit to the court whether certain facts are inferrable from it, but they must find the facts explicitly, and submit the questions of law arising therefrom. Henderson v. Allens, 1 Hen. & Munf. 235. >

### (S 3.) Privy.

A verdict shall be given in court. Co. Lit. 227. b.

Or, may be given privately before the judge in all cases, except in criminal ones, which affect life or member. Ibid.

But in criminal cases, which affect life or member, a privy verdict shall not be given. Co. Lit. 227. b. R. Ray. 193.

But in other criminal cases it may. R. ibid.

And where a privy verdict is given, if the judge or any of the jury die before it is affirmed, it is not good. R. Mo. 33.

The jury may vary from the privy verdict, before it is affirmed in court. Co. Lit. 227. b. R. Mo. 33. R. Dy. 209. a.

So they may vary from the first tender of their verdict in court, before it is recorded. Co. Lit. 227. b.

But after the verdict is recorded, they cannot go from it. Ibid.

So, after a verdict in writing delivered to the sheriff on an extent, it cannot be altered, except in form. 2 Rol. 712. l. 45.

### (S 4.) What things a verdict may find.—Matter of record.

The jury may find by their verdict all things given in evidence, material to the issue, if it be not contrary to the record or the admission of the parties.

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As, they may find matter of record, given in evidence : as, letters patent, statutes, judgments, &c. Hob. 227.

A fine or common recovery. 2 Rol. 691. l. 23.

A record of an attainder produced *sub pede sigilli*. 2 Rol. 691. l. 20.

So, any record regularly proved. Cont. 2 Rol. 691. l. 20. Hob. 227.

So, matters upon record in a spiritual court ; as, a divorce, &c. 2 Rol. 691. l. 25.

**(S 5.) An estoppel.**

So, the jury may find matter of estoppel, and though it is not pleaded and relied upon, when it is found the court shall judge according to law. Co. Lit. 227. a.

And therefore, if a man makes a lease by indenture to A. of his own land, whereby A. is estopped to say, that it was not demised, the jury may find such matter, though it be not pleaded. Co. Lit. 227. a. Dub. Cro. El. 140. Ow. 96. R. 4 Co. 53. R. Cro. Car. 110. Vide 1 Leo. 206.

[\*]And the jury must find the estoppel under pain of an attainder. 4 Co. 53. b.

So, the jury may find tenure of the king by estoppel. 2 Rol. 690. l. 5, 7 H. 4. 41. a.

So, they may find a bond to be made before the date, though the party is estopped from saying so. R. 2 Co. 4. b. 2 Rol. 690. l. 7. 706. l. 17.

But where the plaintiff makes title by estoppel, or pleads and relies upon the estoppel, the jury cannot find contrary to the estoppel. 1 Sal. 276. Vide Estoppel, (B.—E 10.)

**(S 6.) A matter which bars or avoids an estate.**

So, the jury may find a collateral warranty ; for it bars a right. Co. Lit. 227. a. R. 10 Co. 97. b. 2 Rol. 690. l. 10.

So, they may find a condition which defeats an estate. 2 Rol. 690. l. 30. 35. Lit. s. 366.

Or, a release of an estate. Cont. per Shard. 26 Ass. 2. b. Acc. 2 Rol. 691. l. 7.

Or, a confirmation, though they are without deed.

**(S 7.) The jury may find a special matter, when they cannot give a general verdict upon it.**

So, they may find a matter specially for the plaintiff, on which they could not give a general verdict for him, without danger of an attainder : as if a man justifies by a lease 30 Mar. *habendum* from Lady-day before for a year, and the issue is upon the lease, and a lease is proved of 25 Mar. *habendum* from thenceforth for a year, the jury may find for the defendant and not safely for the avowant ; yet they may find specially, on which the court shall give judgment for the avowant. R. Hob. 73. 2 Rol. 690. l. 45.

**(S 8.) Or, give a general verdict, when the special matter does not warrant it.**

So, the jury may find a general verdict for the plaintiff, where the special matter found would be against him : as, in trover, on proof of a demand and refusal, they may find for the plaintiff ; but if it be found specially, it will be adjudged no conversion. Vide Action upon the Case upon Trover, (E). { Vide Thompson v. Button, 14 Johns. Rep. 84. }

On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c. but if it be found specially, it will not be judged so. R. 10 Co. 56. b.

Yet, if the special matter gives a violent presumption of a fact, it shall be adjudged accordingly : as, if the jury find that the parties declared by a subsequent indenture that a recovery was suffered to such uses, the court will adjudge the recovery to those uses. R. 9 Co. 8. b. Mo. 192.

So, if they find a conveyance of one, who fled beyond sea, to trustees for payment of his debts, and that the residue should be at his disposal, with power of revocation, and that he continued in possession [\*] afterwards, it shall be adjudged fraudulent as against the king, though it be not expressly found. R. Mo. 194.

**(S 9.) May find a matter in another place or county. When the place is only for a venue.**

When the matter of the issue is alleged in any particular place for conformity to have a *venue*, the jury may find the thing done in any other place or county. R. 6 Co. 47. a. 2 Rol. 689. l. 40. Vide post, (S 15.)

As, if an executor pleads *plene administravit*, and the plaintiff replies assets at A., the jury ought to find for the plaintiff, if assets at any place within or out of the realm are proved. R. 6 Co. 47. 2 Cro. 55.

So, if the heir pleads nothing by descent at A., the jury ought to find for the plaintiff, if there are assets in any other county or place. Qu. Dy. 271. b. R. 6 Co. 47. a. 2 Rol. 689. l. 16. R. 2 Cro. 503.

So, if there be a feoffment with warranty by tenant in tail, in *formedon* by the issue in Norfolk, the jury may find assets in any county. 6 Co. 47. a.

If tender of homage be alleged at D. it may be found in any other place. 2 Rol. 689. l. 50. Vide post, (S 15.)

So, if the issue be of a thing done out of the realm, it may be found by a jury of the county where the action is brought ; as, if the issue be, whether a ship demurred at M. in Spain. R. 6 Co. 47. b.

A replication to a plea of *ne unques accouple*, in a writ of dower, alleging a marriage in Scotland, need not state that the marriage was had in any place in England, by way of *venue*. Ilderton v. Ilderton, C. P. T. 33 Geo. 3. 2 H. Bl. 145.

And in such case the jury is bound to find matter in another county, under pain of an attaint. Cont. Bro. Attaint, 104. R. 6 Co. 47. a. acc.

**(S 10.) When a local thing is material, upon the general issue.**

So, on every general issue, the jury may find all local things, material to the matter in question, though in another county. R. 6 Co. 47. a.

As, in action on the st. 32 H. 8. for buying of titles in N., where the bargain was for a title of land in another county ; upon the general issue, the jury shall find the value of the land in another county. R. 2 Rol. 688. l. 35.

In assise, they shall find death, &c. in another county. 2 Rol. 689. l. 5. 10.

In ejectment, upon not guilty, if the plaintiff makes title by a lease of land in A., except the manor of B., the jury of one county may find that the manor extends into two counties, and that the lessor had nothing in A. except the manor. R. Hob. 170.

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## [\*](S 11.) When a bar in a foreign county is pleaded.

So, when a bar in a real or personal action is pleaded in a foreign county; as, a release, &c.; the jury shall assess damages for land in another county, and so by a mean shall inquire of a local thing in another county, of which they could not originally. R. 6 Co. 47. a.

As, in trespass *quare clausum fregit*, if a release, arbitrament, &c. in another county be pleaded and tried there, the same jury shall assess damages for the trespass. 2 Rol. 687. l. 50.

So, if a release, &c. in a foreign county is pleaded in assise, aiel, cosinage, &c. 2 Rol. 688. l. 10.

So, in waste. 2 Rol. 688. l. 15.

So, in trespass for breaking his close, if the defendant pleads that the plaintiff is a *villein regardant* to his manor in another county. R. 2 Rol. 688. l. 25.

## (S 12.) At another time.

So, they may find a thing to be done at another time, when the day is not material: as, in trespass for a battery, &c. such a day, the defendant may be found guilty at another day. 2 Rol. 687. l. 25.

So, in conspiracy. 2 Rol. 687. l. 20.

So, in battery, though the defendant justifies by *son assault* the same day, by which the day is made parcel of the issue. R. cont. 2 Rol. 680. l. 45. 687. l. 30. R. cont. Brownl. 233. R. acc. Cro. Car. 514.

## (S 13.) When it shall not a thing in another place:—In criminal cases.

But in criminal cases the jury cannot find an offence in another county than where it is alleged. 6 Co. 47. b.

As, in felony. Ibid.

## (S 14.) When the place is parcel of the issue.

So, when the place is parcel of the issue, the jury cannot find the point in issue in another place. R. 6 Co. 47. a. D. Hob. 170.

## (S 15.) When the place is material.

So, in a local trespass, the jury cannot find the defendant guilty in another county: as, in trespass for the cutting of trees, grass spoiled, &c. 2 Rol. 688. l. 50.

Nor, in another place in the same county. Semb. 2 Rol. 689. l. 35.

And if the jury find a general verdict for the plaintiff, in trespass *quare clausum fregit*, &c. where the proof is of a trespass in another place or county, an attaint lies.

So, a jury in Bucks cannot find a foundation of a priory in Oxon. R. 2 Rol. 688. l. 52.

In an action in an inferior court, the jury cannot find a thing issuable done out of the jurisdiction. 1 Cro. 101. 2 Cro. 503. R. inter Drake and Bear, T. 15 Car. 2. B. R.

[\*]But a jury in an inferior court may inquire of a matter for increase of damages, though done out of the jurisdiction. 1 Cro. 571. Agr. inter Drake and Bear, T. 15. Car. 2.

(S 16.) So, the jury cannot find a thing contrary to the record.

So, the jury cannot find a thing contrary to the record. 2 Rol. 691. l. 30. R. 11 H. 6. 42. a. R. 9 Co. 69. b.

And if a verdict finds matter contrary to the record, it is void as to that. 9 Co. 69. b.

(S 17.) Contrary to the matter agreed by the parties.

So the jury ought not to inquire of a thing which is agreed by the parties to the issue. 2 Rol. 691. l. 35.

As, in dower, if the tenant pleads, always ready to render dower, and the issue is, whether the husband died seised, the jury shall not inquire whether he was seised of an estate of which the wife was dowable; for this is confessed by the plea. 2 Rol. 691. l. 40. 3 Leo. 80.

In waste, for waste in A., if the defendant pleads no such vill as A. the jury cannot inquire whether there was any waste committed, or whether the plaintiff had land in A., for it is confessed by the plea. 2 Rol. 691. l. 45.

In assise, if the tenant pleads that the demandant took the profits *pendente lite*, the jury cannot find that the tenant was not seised; for it is admitted by the plea. 2 Rol. 691. l. 50.

So, if a tenant justifies for common, and issue on the common found for the demandant; the jury cannot find that the tenant did not put in his cattle. 2 Rol. 692. l. 5.

In debt for rent of four acres, the defendant pleads that he demised six acres, *absque hoc* that he demised four only; the jury cannot find a demise of less than four; for it is agreed that four were demised. 2 Rol. 692. l. 20.

If, by the pleading, it appears that there is a manor, and the question arises upon the tenure, the jury shall not find matter which destroys the manor. R. Lut. 1216.

If the defendant avows for a heriot, and shews tenure by fealty and 2s. rent, &c. the plaintiff admits the tenure, and traverses the prescription; if the jury finds a tenure by 12d. it is not material, and the avowant shall have judgment. R. 2 Mod. 5.

If he says that *locus in quo*, &c. is parcel of the manor of B., which is his freehold, and avows for *damage feasant* there, if the plaintiff traverses that the said manor is the freehold of the defendant, it cannot be found that there is no such manor. R. Dy. 183. a.

In a *præcipe* against A. who pleads, and B. as in reversion prays to be received, and the issue is, that B. had not the reversion in fee, and the jury find that neither A. nor B. had anything, B. shall be received; for it is contrary to the admission of the party; for it is admitted that A. is tenant, and the verdict imports that he is not.

[\*](S 18.) Out of the issue.

So the jury cannot find matter out of the issue: as, in debt, on no such award pleaded, the jury cannot find matters which make the award void, if they are not contained in the award itself. R. 2 Rol. 692. l. 25. Vide Hob. 54.

In waste the plaintiff declares upon a feoffment to the use of the defendant for life, remainder to the plaintiff, and the issue is upon the feoffment,



and found that there was a feoffment to such uses ; the jury shall not find that the use to the defendant was without impeachment of waste. R. per three J. 3 Leo. 80. Cro. El. 40.

If a verdict finds matter out of the issue, it is void for so much, though it concludes thereon generally, for or against the plaintiff or defendant. Hob. 53. Vide post, (S 28.)

And though the matter out of the issue destroys the plaintiff's title. 1 Leo. 66.

If the plaintiff by replication pleads assets in a certain manner, and the verdict finds assets generally, it will be good. R. 2 Cro. 140.

But if a verdict does not directly conclude to the point in issue, yet it is good, if the court can collect the point in issue out of the verdict. Hob. 54.

As, if the issue be that the tenant has the fee, verdict, that he has nothing, is good, for it denotes that he has not the fee. Hob. 54.

{ What finding of the jury shall be held as surplussage, being beyond the issue. *Richmond v. Tallmadge*, 16 Johns. Rep. 307. Vide *Bacon v. Callender*, 6 Mass. Rep. 303. }

(S 19.) And a verdict shall be void :—If it finds only part of the issue.

So, a verdict is insufficient for the whole, if it finds only part of the issue, and says nothing to the residue : as, in an information for intrusion into a house and 100 acres of land, if the verdict finds against the defendant for the land, but says nothing as to the house, it is void for the whole. Co. Lit. 227. a. R. 2 Leo. 196.

{ So, if it find only a part of the facts put in issue, it is bad for the whole. *Smith v. Raymond*, 1 Day, 189. Vide *Kerr v. Hawthorne*, 4 Yeates, 295. }

If in debt for 500*l.* on a charter-party to pay 50 guineas per month, defendant pleads he paid 50 guineas per month for all the time, and issue taken that he did not, and the jury find that 357*l.* remains unpaid, and says nothing of the rest of the 500*l.* the verdict is void. *Hooper v. Shepherd*, P. 11 G. 2. Str. 1089. And. 156.

In trespass for breaking his close, and beating his servant, if it says nothing to the battery. R. 3 Leo. 83.

In trespass against husband and wife for beating his horse and other trespasses, a verdict, that the wife beat the horse, and for the residue not guilty, but says nothing as to the husband whether he beat the horse or not, is bad. R. Yel. 106.

In debt for 7*l.* if it finds *nil debet* for 6*l.* and nothing for the residue. R. Cro. El. 133.

In trespass for a gown and manteau, if nothing found for the manteau, R. 3 Lev. 55.

In waste in pulling down, selling and destroying of houses, &c. if nothing found as to the sale. 1 Lev. 309.

So, in an action against three, who plead severally, if three several [\*] issues are joined, and there is a verdict on two issues only, but nothing is said as to the third issue, it is void for the whole. R. 2 Rol. 722. l. 5.

If in a civil case the verdict is taken generally, and any one count is bad, it vitiates the whole. *Trevor v. Wall*, B. R. E. 26 Geo. 3. 1 T. R. 151. *Hancock v. Haywood*, B. R. M. 30 Geo. 3. 3 T. R. 483.

But in criminal cases, if a verdict is taken generally, and there is any one count to support it, the verdict shall stand good. By *Ld. Mansfield*, C. J. *Peake v.*

Oldham, B. R. E. 15 Geo. 3. Cowp. 276. Grant v. Astle, B. R. T. 21 Geo. 3. Dougl. 730.

But the verdict may be amended by the judge's notes, if the amendment is applied for before judgment; and if not applied for in time, the only remedy is a *venire facias de novo*, which may be granted by a court of error. Dougl. *ibid*.

Where the parts of a judgment are separate, it may be affirmed as to part, and reversed as to the rest. 3 T. R. 435.

On a writ of error where one count appears to be bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts damages were given; but that is not applicable to the case where the damages are assessed severally on the separate counts. By Buller, J. *Ibid*.

If the verdict is against law, the court, on motion, will order it to be set aside, and a verdict entered. Man v. Cadell, B. R. M. 15 Geo. 3. Cowp. 282.

In an action by husband and wife for a battery of both, if, on not guilty, the defendant is found guilty for the battery of the wife, but nothing is said as to the battery of the husband. R. Hard. 166.

Yet in trespass for battery and wounding, and not guilty to the wounding and justification to the residue, if it finds that he beat and wounded of his own wrong, but says nothing to the issue on the not guilty, it is good. R. Cro. El. 854.

So, in prohibition, if it finds the custom, &c, for the defendant, but says nothing as to the proceedings after the prohibition delivered. R. 2 Mod. Ca. 3.

But it may find part of the issue for the plaintiff and part for the defendant. Vide post, (S 26.)

Though the issue is entire: as, in a writ of error to reverse a fine by him in remainder after an estate tail, if the defendant pleads a common recovery in bar, and there is issue thereon, and the recovery is found of part of the land, it is for the plaintiff for part, but the defendant may proceed in error to reverse the fine for the residue. R. 2 Rol. 711. l. 30.

In debt on a penal bill for 300*l*. on *nil debet*, it may find for 100*l*. *debet*, for 200*l*. *nil debet*. R. Sal. 664.

If in a special verdict assets are found entire, and if the penalty of three bonds are charges on the assets, then for defendant, if not charges, then for plaintiff, and the court thinks the penalty of two bonds are charges, and of the third not; judgment may be entered thereon, *quia videtur cur*, &c, accordingly. Str. 1028. B. R. H. 219.

So, if it finds words, which imply the whole issue, it is sufficient, though part of the issue is not expressly found: as, in trespass for assault and battery, if it finds the defendant guilty of the trespass and [\*]assault, and says nothing to the battery; for trespass implies it. R. 2 Lev. 111. Cro. El. 85. Vide supra.

So, in an information for forging and publishing a deed, if it finds the defendant guilty of the trespass and forgery predict, but says nothing to the publishing; for the word trespass implies it. R. 2 Lev. 111.

If a man is indicted for forging a bond, for publishing such bond, and for publishing a certain bond, knowing it to be forged, and the jury find a special verdict that he forged a bond, and published the same, and say no more, the court will supply what the jury ought to have done, and find him guilty of the two first offences, and not guilty of the third. Rex v. Hays, T. 3 G. 2. Str. 843. Ld. Raym. 1518.

So, the jury cannot find a part only of a deed or will, but must find the whole, otherwise the verdict is void for the whole. Vau. 84.

But if several pleas go each to the whole, if one of them be found for the defend-

ant, he shall have a general verdict, and the jury need take no notice of the other. *Barber v. Dixon*, H. 17 G. 2. Wils. 44.

< In a declaration in assumpsit, containing a count on a promissory note, and a count for work and labour; general plea of non assumpsit, and a general verdict; it shall be intended, that the jury passed upon the plaintiff's whole demand: And in this case, the plaintiff cannot sustain a second action for a part of his demand, which was not in fact considered by the jury, in the former suit. *Brockway v. Kinney*, 2 Johns. Rep. 210.

So, where there are several counts in assumpsit, all of which are sufficient, and a general verdict and entire damages, the judgment will be held to be valid. *Buster v. Ruffner*, 5 Munf. 27.

So, the jury must pass upon all the issues joined in the cause; and a verdict upon one, without regarding the others, will not sustain a judgment. *Van Benthuyssen v. De Witt*, 4 Johns. Rep. 213. *Brown v. Hendersons*, 4 Munf. 492.

So, if the verdict vary from the issue in a material point, or if it find only a part of the issue, it is bad. *Patterson v. United States*, 2 Wheat. 221.

So, in a criminal case, on an indictment for stealing a cow and calf, where no evidence is offered as to the calf, and a general verdict of guilty is found, a new trial will be awarded. *State v. Bunten*, 2 Nott & M'Cord, 441. >

### (S 20.) If it be imperfect.

When the imperfection shall be aided by intendment, vide post, (S 31.)

When by special conclusion, vide post, (S 35.)

So, a verdict is void which finds the matter so imperfectly that there does not appear a good title for the plaintiff; as in assise for rent, if the jury find a demand and refusal, *et sic disseisivit*, but do not find a demand upon the land, it is void; for other demand is not a disseisin. R. 2 Rol. 693. l. 45. 696. l. 40.

If the jury find a devise till the heir pay so much, but do not find whether the heir has paid or not. R. 2 Rol. 698. l. 40.

If it finds that A. had two sons, B. and C. (and who was heir is the question,) if it does not find which is the eldest son, it is void; for it shall not be intended that B. being named first is the elder. R. 2 Rol. 699. l. 15. Cro, cont. Cro. Car. 392.

If it finds that the lessor of the plaintiff entered and leased to the plaintiff, who was ousted by the defendant, but does not find any title in the plaintiff, *Semb.* 2 Rol. 699. l. 40.

If it finds a lease from a college, and entry by the bailiff for a condition broken, but does not find an authority to enter by deed. R. 2 Rol. 699. l. 50.

If it finds a special title in A. and that B. entered and leased to the plaintiff, and if A. has title, for the plaintiff, &c. but does not find that B. disseised A. so that his entry and lease is void; for it shall not be intended that B. entered by disseisin. 2 Rol. 700. l. 5.

If it finds that 100 acres of wood in the declaration are parcel of a farm, which farm was demised to the plaintiff by indenture *prout*, and the indenture shews a demise of the whole farm, except coppice, but does not find there was any coppice on the farm, or that the wood in the declaration was coppice, it is not sufficient to bring the matter intended by the exception in question, but it is a sufficient verdict for the plaintiff. R. 2 Rol. 700. l. 15.

[\*]If it finds a devise on a condition precedent, but don't find the condition performed. R. 2 Rol. 700. l. 50.

If it finds a feoffment by a father, who is tenant for life, with remainder

to B, his son, with warranty to the plaintiff, and that B. is his only son by such a wife, but does not find that he is his son and heir, and then the warranty will not descend upon him; and it shall not be intended, for he might have another son by another wife. R. 2 Rol. 701. l. 10. Cro. Car. 391.

In *assumpsit* to pay on request, if it finds that he undertook, but does not say *modo et forma*, nor finds any request. R. 2 Rol. 711. l. 45.

If it finds a devise, and does not say that the devisor is dead. R. 2 Leo. 120.

If a verdict find that Julian wife of B. is dead, when the issue is whether Jemmet wife of B. is dead, and does not say that Julian and Jemmet are the same name. R. Mo. 411.

If, in an information for usury, it finds *quod corrupt. agreat. fait*, but does not find the loan. R. 2 Cro. 210.

So, if the verdict does not expressly find matter necessary to maintain the action, it is imperfect. R. 2 Jon. 61.

As, if it finds an entry but no expulsion. Poph. 12.

So, if it finds matter specially, and finds an entry by the defendant on the plaintiff, and then makes a general conclusion, without finding title in the defendant, or possession, there shall be judgment for the plaintiff, without regard to the special matter. R. Cro. El. 438.

So, if a verdict does not find damages and costs, it is imperfect, as, in annuity. R. 11 Co. 56. a. 2 Rol. 722. l. 30.

Or, finds entire damages when it ought not; for insufficient damages are as none. 11 Co. 56. a.

So, in detinue, if it does not find the value as it ought. 10 Co. 119. b.

Or, in *valore maritagii* does not find the value of the marriage. R. 10 Co. 119. a. 2 Rol. 722. l. 10.

But the omission of finding damages and costs will be aided by a release of them. R. 11 Co. 56. a.

So, an omission of that, which the court *ex officio* shall enquire of, will be aided by a writ of inquiry. 10 Co. 119. a.

If there are several issues, and a verdict good as to one, and imperfect as to others, a *venire facias* goes to all. R. 2 Rol. 722. l. 45.

So, in an action against several, if the verdict is good as to some, imperfect as to others, there shall be a *venire facias de novo* as to all, and a defendant found not guilty may afterwards be found guilty. R. 2 Rol. 722. l. 35. 2 Cro. 627.

If the verdict is defective, and omits finding any thing within the province of the jury to find, no judgment can be given, and there must be a *venire de novo*. Rex v. St. Asaph, 8 T. R. 428. *in notis*.

So, if there be a demurrer to part, and issue for part, and the verdict does not find damages for the matter in the demurrer, it is wholly void. Dub. 2 Rol. 723. l. 5.

[\*]But it may be aided by a release of damages on the demurrer, or a *non pros*. R. 1 Sal. 346.

So, if a verdict be imperfect, it shall not be rectified by the same jury, but a *venire de novo* must issue. R. 2 Cro. 210.

If it appears on the face of the *jurata* that the cause was tried after the day of *nisi prius* mentioned therein, there must be a *venire facias de novo* awarded, for the *hab. corpora* and *jurata* cannot in this case be amended. Crowder v. Rooke, T. 2 G. 3. 2 Wils. 144.

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Wherever attaint would lie, writ of inquiry cannot be awarded to assess damages, but *venire de novo* must go; so, if issue is joined in abatement, and verdict for plaintiff. *Eichorn v. Lemaitre*, H. 8 G. 3. 2 Wils. 367.

In debt for the penalty of 500*l.* on articles not to cut trees, &c. on penalty, &c. if there is verdict for plaintiff, that defendant owes the debt and one shilling damages, a *venire facias de novo* shall go, for jury should have assessed the real damages on the breaches assigned, and plaintiff cannot take verdict for the whole debt by 8 & 9 W. 3. c. 10. *Drage v. Brand*, P. 8 G. 3. 2 Wils. 377.

On *riens per descent*, verdict, "that there are lands sufficient," good, though the value not set out. *Barnes*, 444.

{ But although a verdict may not conclude formally in the words of the issue, yet, if the point in issue can be concluded out of the finding, the court will put it into form, and make it subserve the justice of the case. *Porter v. Rummery*, 10 Mass. Rep. 64. Vide *Patterson v. United States*, 2 Wheat. 221. }

### (S 21.) If it be uncertain.

So, an uncertain verdict is void; as, in debt against an executor, who pleads *plene administravit*, if the jury find he has goods in his hands unadministered, and does not say to what value. Co. Lit. 227. a. { *Fairfax's Exr. v. Fairfax*, 5 Cranch, 19. }

For it must find the fact clear to a common intent. Vau. 75.

In *valore maritagii*, if it finds the marriage of the heir, and does not say by whom. R. 9 Co. 74. a.

If it finds the st. 27 Eliz. for making void fraudulent conveyances, and does not find the conveyance fraudulent; for it does not bring it within the statute. R. 10 Co. 57. a.

In dower, on *nunques seisie que dower*, if it finds that the husband was seised of so much as B. has, and does not say how much. R. 2 Rol. 694. l. 30.

In ejectment, if it finds the defendant guilty of eight pieces of land, without other certainty. R. 2 Rol. 694. l. 50. Vide Sav. 35.

In an action on a penal statute, which gives a penalty for every offence, if it finds the defendant guilty contrary to the statute, but does not say how often he is guilty. R. 2 Rol. 696. l. 5.

In account against A. as receiver of 10*l.* by the hands of B., other 10*l.* by the hands of D., if it finds that he received only one 10*l.* but does not say by whose hands. R. 2 Rol. 689. l. 5.

If it finds that there was a demand for rent due at Lady-day, and does not say for a year or half a year then ended. R. per three J. Windh. cont. Sav. 122.

If it finds A. his only daughter, it is not sufficient, without saying that she was his heir. R. 3 Lev. 125.

In ejectment, if it finds the defendant not guilty for four closes, containing 400 acres, and finds specially for the residue, and it does not appear how much the residue was. R. 2 Cro. 113.

If there are four different demises in ejectment, and a verdict for plaintiff that he recover his term aforesaid, without saying which, it is void. *Lady Cass v. Title*, H. 12 G. Str. 682.

[\*] So, if debt be for 40*l.* on several contracts, and a verdict as to 30*l.* *quod debet*, as to 10*l.* *quod nil debet*, but it does not say on which contract it finds for the plaintiff, on which not. R. 2 Rol. 270.

So, if it finds damages uncertainly; as, in *assumpsit*, if it finds damages, 40*l.* if the law wills that they should give 40*l.* but if the law wills not, then 3*l.* R. 2 Rol. 695. l. 50.



So, if it be uncertain for what thing or time the damages are given. R. 2 Sand. 171.

Yet, they may give less or greater damages on a contingency, and refer it to the court.

So, on a covenant to pay 11*l.* for every acre of land less than was alleged on a purchase, and breach assigned that there were so many acres loss as amounted to 700*l.*, the jury find that there were so many, &c. and give 400*l.* damages, it will be good, though they find all the acres wanting, &c. for they are chancellors, and may mitigate damages. R. 2 Rol. 703. l. 10.

{ Of the uncertainty of verdicts in general. Doe v. Northern, 1 Wash. 282. Donaldson v. Alexander, 1 Wash. 331. 'Blanks' Admr. v. Foushee, 4 Munf. 61. Boatright v. Meggs, 4 Munf. 145. }

### (S 22.) If it be only argumentative.

So, a verdict which finds the matter in issue only by argument and inference, is void; as, if the issue be, that a copyhold granted for three lives is heriotable, and the jury find that there never was any, such grant in that manor; for it is not found directly that it is not heriotable, but only by argument. R. 2 Rol. 693. l. 10.

So, on an issue that by the custom a grant may be to three for the lives of two, a verdict, that a grant for three lives is good, will be void; for it does not find the issue but upon the inference, that the grant of a less estate is good where the custom warrants a greater estate. R. 2 Rol. 693. l. 15.

If the issue be, whether a copyhold may by custom be granted in tail, a verdict, that it may be granted in fee, is void. Per Hought. 2 Rol. 693. l. 20.

In debt, on a special *non est factum*, for that the bond was read as an acquittance, verdict that he is lettered, and knew it to be a bond, and gave it voluntarily, is not good; for it ought to find directly that it is his deed. 2 Rol. 693. l. 25.

So, if the defendant pleads *solvit*, and issue is thereon, verdict that the defendant owes the money is not good, for it finds only by argument *quod non solvit*. R. 2 Rol. 693. l. 32.

So, in trespass for taking and cutting his leather, the defendant justifies as a searcher, &c. and that he in searching it cut it *more scrutator*.; the plaintiff replies, of his own wrong *absque hoc* that he cut it *more scrutator*.; verdict that he cut it of his own wrong is not good; for it does not find the issue but by argument. R. 2 Rol. 694. l. 10.

If the issue is, whether the tenure be of B., verdict that he holds of C. is not sufficient. R. 1 Lev. 210.

In *assumpsit*, if the verdict find that the plaintiff has damage by non-performance of the promise, it is not good. R. Yel. 77.

In trover, on not guilty, if it finds that the defendant converted the goods to his own use, it is not good, though tantamount to not guilty. R. Cro. El. 866.

[\*]So, in all cases, a general verdict which finds the point in issue by way of argument, is void, though the argument or inference is necessary. Vau. 75.

### (S 23.) If it be repugnant.

So, if it be repugnant: as, if in ejectment for 20 acres the jury find a demise for 10 acres only, and if the court are of opinion that this is a demise  
[\*245]

of 20 acres, then, &c. it is repugnant, and void for the whole. R. 2 Rol. 695. l. 30.

If it finds that A. was seised till 1st Feb., and that a writ of entry was sued against B. and C. *tunc tenent.*, returnable 23d Jan., to the intent to suffer a recovery, here no tenant to the *præcipe* is found; for if A. was seised till 1st Feb. it will be repugnant that B. and C. could be *tunc tenent.*; and, therefore, it is void for the whole. Per Hob., but the other J. cont. Hob. 262.

In appeal, if the verdict finds the defendant not guilty of homicide and felony, and then finds him guilty *se defendendo*. 1 And. 41.

On an indictment for a riot, if it finds the defendant guilty of the fact, and not guilty of a riot. 3 Mod. 72.

If there is a verdict for defendant, when by his own shewing he is guilty: as, if he justifies under a distress for rent, and shews that the appraisers were sworn by the head-borough, when there was a constable present. Broome v. Rice, T. 4 G. 2. Str. 873.

But if the thing, which makes the repugnancy, may be rejected as surplusage, it is good. Vide post, (S 28.)

So, in an action on the case for disturbing his common by digging turf and a fish pond, the defendant pleads that he left sufficient common; verdict, that by digging turf he has not left sufficient common; that by the fish-pond he has left sufficient; and so finds that the plaintiff has sufficient common, and has not, yet it is good, for it is in different respects. Dub. Cro. Car. 495.

{ So, in an action for freight and demurrage, where the jury rendered their verdict in these words, "we find for the plaintiff, and are of opinion that the plaintiff has already received, out of property of the defendant, payment in full for the amount of freight to which he is entitled," the verdict will be set aside. Diehl v. Evans, 1 Serg. & Rawle, 367. }

**(S 24.) If it be variant from the declaration.**

So, if there be a material variation between the verdict and the declaration: as, in debt upon a contract, if the verdict finds a different contract. 2 Rol. 702. l. 20. usq. 45.

In detinue of a bond, &c. if it finds a different bond. 2 Rol. 703. l. 30.

In *assumpsit*, if it finds a different promise. 2 Rol. 703. l. 35. 719. l. 5. 10. 50.

In an action on the case for slander, if it finds words materially different, though of the same sense, or equally slanderous: as if the declaration be, he is a bankrupt, verdict, he will be. 2 Rol. 717. l. 45.

Or, if the declaration be, he is a thief, verdict, he stole a horse. 2 Rol. 717. l. 50.

Declaration in the second person, thou stolest, &c. verdict in the third, he stole. R. 2 Rol. 718. l. 10.

So, in ejectment, if it finds a different lease. 2 Rol. 704. l. 35. 719. l. 32. ad 50. Hob. 73. Latch, 93. Hard. 330. 2 Lev. 14. And vide *ibidem*, what leases are variant.

[\*] So, in waste for cutting down trees, verdict, that he dug up. 2 Rol. 720. l. 10.

The *et similiter* left out in issue delivered, though inserted in record, is fatal. Barnes, 475.

He the said indorsed, in issue, he the said A. indorsed, in record, fatal. *Bartlet* 476.

But a small or immaterial variation does not avoid the verdict. *Vide post*, (S 30.)

And if the record of *nisi prius* agrees with the declaration delivered, a variation from the issue delivered is not material. *Shepley v. Marsh*, P. 18 G. 2. Str. 1131.

If the record of *nisi prius* agrees with the roll, though not with paper-book of the issue, verdict shall not be set aside; and if the record of *nisi prius* is wrong, the court will amend it by the roll, after a verdict on defence made. *Leeman v. Allen*, P. 3 G. 3. 2 Wils. 160.

< If, in an indictment for a rape, the jury cannot agree to convict the prisoner of the offence charged, they may find him guilty of an assault, with intent to commit a rape. *Commonwealth v. Cooper*, 15 Mass. Rep. 167.

In detinue, it seems, that the jury may assess damages to an amount exceeding the value laid in the declaration. *Bigger's Admr. v. Alderson*, 1 Hen. & Munf. 54.

But, if in covenant, the verdict be for a larger sum than the amount laid, a *venire de novo* will be awarded. *Cloud v. Campbell*, 4 Munf. 214. *Vide Mooney v. Welch*, 1 Rep. Con. Ct. 133. >

(S 25.) Or, gives damage for a thing not incurred.

So, a verdict shall be void, if it gives damages for that for which no cause of action was then incurred: as, in an action upon the case for seducing his apprentice, *per quod* he lost his service for the residue of the term, which is not yet expired, for he may afterwards return and serve. R. 2 Sand. 169. 1 Lev. 299.

So, in an action on the case for building a mill, 3d August, *per quod* a close was overflown, *et totum proficuum a 2 Jul. amisit*, if the jury give entire damages. R. Sal. 663.

But in covenant, if the plaintiff assigns a breach, for that the house *fuit et adhuc tenebros. existit*, the damages shall not be intended for any thing after the action brought. R. 3 Lev. 246. 346.

(S 26.) But a verdict is sufficient:—If it finds the substance of the issue.

But it is sufficient, if the substance of the issue is found. Co. Lit. 227. a.

As, in an issue, if A. be joint tenant with B., if the jury find that A. has nothing, it is against him; for he cannot be a joint tenant if he has nothing. 2 Rol. 705. l. 40. 50.

In trespass in Middlesex, the defendant justifies by a writ in London; the plaintiff replies, that he took in Middlesex of his own wrong without such cause; if it finds that he took by writ in Middlesex, it is sufficient; for the effect of the issue was upon the place. 2 Rol. 706. l. 2.

In *audita querela* upon payment after execution, and issue thereon, if it finds a payment before, it is sufficient; for payment was the substance, and the time not material. R. 2 Rol. 706. l. 15.

On an issue, if taken by *ca. sa.*, if it finds a taking by an *alias capias*, it is sufficient. R. Hob. 54. 2 Rol. 707. l. 10. and many cases, *ibid.* 708, 709. 711. Mo. 858.

In ejectment, a lease of a manor is pleaded, whereof the tenements in which are parcel, and issue *an demisit maner.*: if it finds that he demised a

farm called the manor, whereof the tenements, in which [\*]are parcel, and that there are copyholds but no freeholds there, though this is not a manor in law, yet it is sufficient; for the substance is a demise or not. R. 6 Co. 87. 2 Rol. 712. l. 5.

In ejectment for a moiety, as one of two co-heirs, a verdict for a third part, plaintiff appearing to be one of three co-heirs, is good; for plaintiff must recover according to his title. *Denn v. Purvis*, P. 30 G. 2. 1 B. M. 826.

Issue whether A. was in the realm 1 Aug. 3 Car. and remained five years without entry or claim to avoid a fine, if it finds he was 4 Car. and not 3 Car. it is sufficient; for the time is not material, if he was five years without claim. R. 2 Rol. 713. l. 10.

Issue in trespass, whether the land was the freehold of A. if it finds that as to two parts it was the plaintiff's freehold, and the other part A.'s, it is sufficient; for it finds as much as proves the action not maintainable. R. Cro. El. 157.

In prohibition, it was suggested that a *modus* of 4s. time whereof, &c. was paid, and issue upon the *modus*, and it was found by the verdict that there was a *modus* of 4s. 6d.; R. that the defendant shall not have a consultation, for a *modus* is found, though it is not the same as was suggested. Cro. El. 819.

So, it is sufficient, if it does not find the words of the issue, but words tantamount; as, if the issue be, whether the plaintiff *habuit et gavisus fuit officium prædictum*, verdict, *quod occupavit*, is sufficient. R. Mo. 401.

Indictment, that defendant *fabricavit et contrafecit* a bank-note for 520*l.* verdict, that he *erasit et alteravit* a note by turning the word two into five, held good, and judgment against defendant. *Rex v. Dawson*, M. 3 G. Str. 19.

So, it is sufficient, if it finds so much of the issue as maintains or avoids the bar, though it does not find all the words of the issue: as, if the obligor pleads *solvit ad diem*, the plaintiff replies that the defendant, nor A. and B. joint obligors, *nec eorum aliquis solvit*, and issue thereon, if it finds that the obligor *non solvit*, it is sufficient. R. Cro. Car. 6. 7.

If a special verdict on a *mandamus* finds that plaintiff was chosen a jurat, then chosen mayor, received the sacrament within a year before chosen mayor, but not before chosen jurat, it is good, though it does not find that there was no prosecution. *Martin v. Jenkin*, M. 14 G. 2. Str. 1145.

So, it is sufficient if it finds the defendant guilty for part only of the demand on charge in the declaration: as, in trespass, if it finds him guilty for part only of the trespass alleged. Vide 2 Rol. 688. l. 20. 703. l. 25. 704. l. 5. 10. Vide ante, (S 19.)

To trespass *vi et armis* for assault and battery, charging special damages, defendant pleads as to the *vi et armis* not guilty, and issue is joined; and as to the special damages pleads "*non assaull demesne*;" plaintiff replies, "*de injuria sua propria absque tali causa*," and issue is joined; verdict, "guilty of the trespass within written," is good. *Hawks v. Croston*, M. 32 G. 2. 2 B. M. 698.

In ejectment, if it finds him guilty only for part of the lands or tenements demised. R. 2 Rol. 703. l. 40. Cro. El. 13. 3 Lev. 334.

[\*]So, in an action upon the case for putting in cattle and consuming his common, if he is found guilty only for depasturing the common, and not guilty for putting in the cattle. R. 9 Co. 112. 2 Rol. 704. l. 15.

So, in an information upon a penal statute, if it finds only one defendant guilty, or only in part. R. 2 Rol. 707. l. 30. 50. 708. l. 5. Cro. El. 835.

So, in action for words, you stole my horse, and another count for [\*247] [\*248]

charging with felony, if it finds that he did not charge with felony, but finds the words, it is sufficient as to them. R. 2 Rol. 710. l. 5.

So, in account, the defendant pleads to part bailiff to the plaintiff and a stranger, if it finds him bailiff to the plaintiff for so much, without more, it is sufficient. R. Mo. 548.

Otherwise, if the declaration is upon an entire contract, promise, &c.; for then, if it finds against the defendant for part, it is a material variation. R. 2 Rol. 702. l. 20. *ad* 45. 707. l. 55.

If there is enough found, on several issues joined, for court to give judgment on, there shall be no new *venire*, though on one issue no proof nor verdict. Barpes, 461.

(S 27.) Or, omits a thing not material.

So, omitting to find a thing not material does not avoid the verdict: as, if it finds that A. was seised and devised to B. paying debts and legacies, and refers to the court what estate passed, it is not material, though it does not find whether B. has paid the debts and legacies; for it is a condition rather than a limitation. R. 2 Rol. 699. l. 5.

So, in debt for 750*l.* upon a bond *pro septuagint et quinquagint. libris*, if the jury finds that the defendant made the bond, it is sufficient, without finding that it was intended for 750*l.* R. Hob. 116.

So, in trespass, or *rescous*, if the defendant alleges that A. *tenuit* by rent and heriot-service, and justifies for a heriot, it is sufficient, if it finds a tenure by heriot-service; though not for the same rent. Semb. Cro. El. 799.

Otherwise in replevin, for the avowant ought to prove the tenure alleged. R. Cro. El. 799.

(S 28.) Surplusage does not avoid it.

And surplusage shall not hurt: as, if the jury find a direct verdict for the plaintiff or defendant, and then add uncertain or contradictory matter. Vide several cases. 2 Rol. 695. l. 5. 15. 35. 1 Leo. 92. R. Mo. 431. R. Cro. El. 480. R. Cro. Car. 76. 130. 174. R. 2 Sand. 308. Sav. 112. Vide post, (S 40.)

As, upon a *non est factum*, if it finds that it was his deed, but delivered after the date. 2 Rol. 706. l. 17.

If the issue be, whether A. and B. enfeoffed, if it finds that A. and B. did not enfeoff, but that A. alone enfeoffed, the last clause is void. 2 Rol. 706. l. 25.

Verdict, that an executor *administravit vel ad usum proprium disposuit*, [\*] is good, though in the disjunctive, and one way had been sufficient. R. Hob. 49.

If it finds the prescription alleged, it is good, though it finds more. R. Hob. 117. R. 2 Lev. 253. Mod. Ca. 4.

If it finds a demise for life upon the land, but no other livery. R. Cro. El. 482.

Or, *quod* A. 10 Jun. *demisit habendum a die dat.*, and livery 23 Jul. this being repugnant shall be rejected. R. 2 Cro. 153.

So, in ejectment for 12 acres of land, if the defendant is found guilty for 20, the plaintiff shall have judgment for 12. R. 2 Rol. 707. l. 5.

In an action against husband and wife for words by the wife, if it is found that the husband and wife spoke, it shall be surplusage as to the husband, and a good verdict against the wife. R. 1 Rol. 216. R. 2 Rol. 433.



So, if the jury find that the defendant committed waste and sold, and then find the particulars of the waste but no sale; the first being only the title of the verdict shall be rejected as surplusage. R. 2 Sand. 255.

So, if it finds so much for damages, to be paid in dying if it can be, the last words shall be rejected. R. Cro. Car. 219.

So, if it finds the matter in issue and other matter out of the issue, which makes *contra*. Vide ante, (S 18.)

So, if tenant by receipt pleads that A. was seised for life, reversion to him, the demandant replies that A. was seised in fee, and issue thereon; a verdict that A. had nothing in the land, nor the other in reversion, is for the tenant by receipt; for it is found that A. had not the fee, and other is surplusage. 1 Rol. 705. l. 40. 50. 3 Leo. 80.

So, on an indictment for battery, if the jury find the defendant guilty *prout* Sir T. F. *versus eum queritur*, where the indictment was found at the assizes and Sir T. F. only joined issue for the king as the king's coronator *et attorn.* in B. R. it will be good; and *prout* Sir T. F. *versus eum queritur* rejected as surplusage. R. 2 Sand. 308.

{ Where the verdict finds matter out of the issue, it shall, generally, be rejected as surplusage. Richmond v. Tallmadge, 16 Johns. Rep. 307. Bacon v. Calender, 6 Mass. Rep. 303. Lincoln v. Hapgood, 11 Mass. Rep. 358. }

**(S 29.) Except where it tends to the prejudice of the party.**

But when the surplusage tends to the prejudice of the parties, it is bad; as, in trespass for assault, battery, and wounding, the defendant justifies the assault and battery, and issue is thereon; the jury find the defendant guilty for the assault, battery, and wounding, and give entire damages, it is bad; for damages are given for the wounding, which was not in issue. R. per three J. Wind. cont. 1 Sid. 96.

**(S 30.) Nor, a small variation.**

Nor, a small addition or variation; as, if the declaration be of land in Spreton and Begley, and the verdict of land in Spriton and North Begley, R. 1 Sid. 27. Vide ante, (S 24.)

Evidence of a house, situate, in the parish of M. will support an averment of a house "at S." S. being extra-parochial, and both places usually [\*]going by the name of S. Burbige v. Jakes, C. P. E. 38 G. 3. 1 Bos. & Pull. Rep. 225.

In *assumpsit*, if the jury assess damages *occasione debiti prædicti* where it should be *occasione non performance assumption. prædict.* R. Rol. 696. l. 10. Hob. 89.

In an action upon the case for an escape against the gaoler of the prison of the castle of M., a verdict finding that the defendant is gaoler of the prison there, and permitted the escape; but that there is no castle there, is good. R. 2 Rol. 712. l. 2.

In an action for slander, if the declaration and verdict vary by the addition, omission, or change of any words, which are not material for the maintaining of the action or increase of damages. R. 2 Rol. 717. l. 15. *ad* 50-718. l. 20. *ad* 50. R. Hob. 180. R. Yel. 152.

Otherwise if the words are totally different, though of the same sense. Vide ante, (S 24.)

In an action on the st. 2 Ed. 6. for not setting out of tithes, and declaration upon a lease, if A. so long live, and continue parson, if it finds a lease  
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if A. so long live, without more, it is sufficient ; for it determines if he resigns, or does not continue parson, and therefore the substance is found ; for the words omitted are what the law implies. R. 2 Rol. 718. l. 5.

In ejectment, if it finds a lease not materially variant. Vide 4 Leo. 14. 2 Rol. 704. l. 30. 40.

In trespass, if it finds him guilty in a moiety of the land described in the declaration, in the other moiety not guilty. R. 2 Cro. 183.

So, if it varies in a point collateral to the matter in issue ; as, if A. avows and pleads a lease for 21 years, and a grant of the reversion to him, and the grant of the reversion is traversed ; if the jury find a lease variant from that pleaded, it is not material. R. 2 Rol. 705. l. 25.

If the issue be on a feoffment to the use of A. for life, and afterwards to C. in tail, if it finds a feoffment to the use of A. for life, and then to other uses, which are determined, and then to the use of C. in tail, it is good ; for the uses determined are not material. R. 2 Rol. 712. l. 20.

In *assumpsit* by assignees of commissioners of bankrupt for 40l., if the verdict finds the debt 35l. only. R. Al. 28.

So, if a verdict varies from the sum demanded, it does not prejudice ; as, in debt, if it finds less due than was demanded ; for the residue may be paid. R. 2 Rol. 702. l. 50.

So, in *assumpsit*, on the custom of merchants, that either alone shall pay money promised by two to be paid at certain days, when they are found in arrear on account, if the verdict varies as to the days of payment, the days being past. 2 Rol. 703. l. 5.

So, if a verdict finds a variation, when notwithstanding, the matter found is sufficient to maintain the issue, the verdict is good.

In action on promissory note, if there are two counts, one on the note in 1732, (as it was,) and the other for money lent in 1733, and as to this last count the issue varies from the declaration as to the time, it is not material. Wright v. Crust, P. 9 G. 2. B. R. H. 252.

If the issue delivered is entered of Trinity, and the record of *nisi prius* is of Easter, it is not material. Crofts v. Wilkin, T. 9 G. 2. B. R. H. 303.

[\*] If plaintiff's accepting issue is omitted in issue delivered, but inserted in record, and defendant on trial makes defence, (though only by excepting to plaintiff's evidence in point of law,) verdict shall not be set aside. Barnes, 455.

John John S. in declaration, John S. in issue, immaterial. Barnes, 476.

So, that plaintiff was indebted to plaintiff. Barnes, 477.

So, award of *venire*, twelve good, &c. *venire* itself twelve free. Barnes, 487.

(S 31.) And it is sufficient, if it may be supplied by intendment.

And incident and necessary circumstances shall be supplied by intendment ; as, on a general verdict, all circumstances which warrant the finding of the jury shall be intended. 2 Rol. 694. l. 5.

So, if a man may lease, reserving the most accustomable rent for 20 years before, if the jury find a lease, rendering the customary rent, it is sufficient ; for it shall be intended the most accustomable for 20 years ; for customary extends to all precedent time. R. 3 Co. 9. Heydon.

A bargain and sale found, without mentioning the consideration, shall be intended upon good consideration. Cro. El. 819. R. 2 Rol. 699. l. 10.

{ So, if part of a promise be made on good consideration, and part is *nudum pactum*, it shall be intended, after verdict, that the damages were assessed on the part which was good. Phetteplace v. Steere, 2 Johns. Rep. 442. }

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A ~~retainer~~ of a deputy, &c. found, shall be intended by deed. R. 9 Co. 51. b.

A presentment after a resignation; a consent to the resignation shall be intended. R. 2 Cro. 64. Yel. 61.

If it be found that he was seised in fee, and made a will, upon which the question arises, it shall be intended that it was land in socage, and that he devised it by his will, though it be not directly found. R. 2 Rol. 696. l. 20. 25. R. 2 Rol. 223.

So, that he died seised. R. 2 Rol. 694. l. 35. Vide several cases to the same effect. 2 Rol. 698. l. 20. 35. R. cont. 2 Rol. 699. l. 20.

If letters patent are found, they shall be intended under the great seal. R. 2 Rol. 699. l. 35.

If it finds that A. *recogn. se debere* before the mayor of the staple, it shall be intended that it was by writing obligatory, and according to the form of the statute. R. 4 Co. 65. b. 2 Rol. 700. l. 35. Hob. 55.

If it finds a court-baron held at the usual place, it shall be intended within the manor. R. 9 Co. 51. Hob. 56.

If the jury find that the defendant was not taken by a *ca. sa.* but by an *alias capias*, it shall be intended that the *alias* was on the same judgment, and between the same parties, otherwise it would not have been doubted whether the *alias* was sufficient. R. 2 Rol. 696. l. 50. Hob. 55. Vide Cro. Car. 458.

So, it shall be intended, that he was kept in execution; for it is consequential on the taking. R. 2 Rol. 697. l. 10. Hob. 56.

Trespass in four acres of land in A. and B. verdict of the third part of two acres, and it does not say in what vill, it shall be [\*]intended that every acre was in both vills. R. Yel. 223. Cont. Sav. 35. Acc. Cro. El. 465.

If it be found that a man *virtute warranti* made a lease, it shall be intended that he pursued his warrant, though all the circumstances are not found. R. Cro. El. 167.

If a verdict finds a lease by tenant in tail, it shall be intended that he continues alive. R. cont. Cro. El. 407. Vide ante, (S 66, 67, 68.)

If it finds a grant by patent, and *ulterius* grant, &c. it shall be intended by the same patent. R. 2 Brownl. 232. 4.

If it finds a deprivation by a bishop, it shall be intended well made. R. Jon. 393.

{ In a declaration containing but one count, and a part of the allegations are good, and a part bad, it shall be intended, after verdict, that damages were given for the actionable part. *Steele v. Western Inland Lock Navigation Co.* 2 Johns. Rep. 283.

So in a declaration containing several counts, some of which are good, and others bad. *Wolcott v. Coleman*, 2 Conn. Rep. 324. Vide *Neal v. Lewis*, 2 Bay, 204.

But in Massachusetts, it has been held that where the declaration contains several counts, some of which are materially defective, and a general verdict found upon all the counts, the judgment may be arrested or reversed on error; for the reason that the court cannot determine, that no damages were given upon the defective count. *Kingsley v. Bill*, 9 Mass. Rep. 198. *Benson v. Swift*, 2 Mass. Rep. 50. *Stevenson v. Hayden*, 2 Mass. Rep. 406. Vide *Barnard v. Whiting*, 7 Mass. Rep. 358. *Nye v. Otis*, 8 Mass. Rep. 122. *Barnes v. Hurd*, 11 Mass. Rep. 59.

So, in covenant, where several breaches are alleged, and a discharge pleaded as to part, and issue taken as to the rest, and a general verdict for

the plaintiff, the verdict shall be intended for such breaches only, as are not covered by the special plea. *Eastman v. Chapman*, 1 Day, 30.

So, if there be two counts in a declaration, in an action of debt, and it appear from the record that evidence was given on one count only, and a general verdict is found, the verdict will be intended as referring to the count to which the evidence was applied. *Ross v. Gill*, 1 Wash. 89. }

**(S 32.) And shall have a reasonable intendment.**

So, words shall have a reasonable intendment ; as, in assise, if the jury find that the defendant is tenant, and disseised the plaintiff, it is sufficient, without saying that he is tenant of the freehold, or that the plaintiff was seised and disseised ; for it shall be intended that he is tenant of the freehold, and not by statute-merchant or otherwise. R. 2 Rol. 693. l. 40.

If the jury find the contents of a deed, &c. and afterwards the deed in *hac verba*, the court will judge on the deed itself, and not on the collection of the jury. Vau. 77.

**(S 33.) And a reasonable construction.**

So, if a verdict finds that A. granted to his companion, the court construes it that he released ; for this is the proper conveyance from one joint-tenant to another. 2 Sand. 97.

**(S 34.) When an intendment does not aid.**

But intendment does not aid a matter which stands indifferent and is material ; as, that rent was demanded upon the land. Vide ante, (S 20.)

If it finds a bargain and sale, it shall not be intended that it was inrolled. Hob. 262.

So, if it finds a fine, it shall not be intended with proclamations. Ibid.

If it finds a gaoler insufficient at the time of the escape, in an action against the superior, it shall not be intended that he was so at the time of the action. R. Eq. Ca. 527.

So, it shall not be intended that no damages were given for a thing, which is sensible though insufficiently alleged. R. 1 Sal. 129. 364.

{ On a special verdict, nothing shall be intended but what is found by the jury. *Jenks v. Hallett*, 1 Caines' Rep. 60. *Ingersoll's Les. v. Blanchard*, 2 Yeates, 543. *Crousillat v. Ball*, 3 Yeates, 375. *Tunnel v. Watson*, 2 Munf. 283. Vide *Robertson v. Ewell*, 3 Munf. 1.

Cases where, from the finding of a particular fact, by special verdict, the existence of another fact necessary to the confirmation of a right may be intended. *Jackson v. Rightmyre*, 16 Johns. Rep. 314. }

**(S 35.) When verdict aided by a special conclusion :—for the court doubts nothing but that which is referred to the court.**

So, an imperfect verdict may be aided by a special conclusion ; for the court will not doubt of any thing but what is referred to the court [\*] by the verdict. R. 5 Co. 97. a. R. Mo. 268. 2 Rol. 698. l. 30. 40. 702. l. 10. D. Lit. 94. 134.

As, if the jury refers, whether a resignation, &c. be good ; whether there was a resignation shall not be doubted. R. Yel. 61. 2 Cro. 64.

If entry be lawful, it shall not be doubted whether A. who commanded the entry was alive. R. 3 Leo. 152.

Nor shall it be doubted whether the defendant's title is good, though none found, if the plaintiff's entry is not lawful. R. Cro. El. 438.

If the jury find the defendant guilty, if the will was executed, it shall not be doubted whether the devisor was seised. R. Eq. Ca. 256.

So, if a special verdict does not find a title for the plaintiff, but concludes, if the patent be good, for the defendant, if not, for the plaintiff; if the court judges the patent void, the plaintiff shall have judgment: for the court will intend that the jury were satisfied that the plaintiff had a good title, if it was not avoided by the patent. R. Cro. Car. 22.

So, if the jury conclude, if the devise is in fee, for the defendant, it shall not be doubted whether there was other land in fee to supply the devise to the plaintiff. R. Cro. Car. 130.

If such goods were distrainable, for the plaintiff, it shall not be doubted whether there was a good cause for the distress. Scomb. cont. 1 Sal. 249.

**(S 36.) And therefore a special conclusion waives the special matter.**

So, if a verdict finds a special matter in assise, and says besides, that the plaintiff was seised and disseised, such special conclusion waives the special matter. 2 Rol. 696. l. 20.

If the plaintiff declares upon a lease by father and son, the jury find a lease by father and son, but that the father was tenant for life, remainder to the son, and so it was a lease by the father only, and a confirmation by the son, and concludes whether it was a good revocation; on such conclusion the court does not take notice of the other matter. R. Jon. 393.

**(S 37.) So, a special conclusion aids other defects.**

So, a special conclusion on a single point aids imperfection in other parts of the verdict: as, if the jury find a special matter, and conclude, if the lease found be a revocation, &c. this aids a variance between the declaration and verdict. R. 2 Rol. 701. l. 30.

So, such a special conclusion aids a repugnancy between one part of the verdict and another. R. 2 Rol. 701. l. 45. Hob. 54.

**(S 38.) But a conclusion does not aid:—if it be contrary to the premises.**

Yet, the conclusion does not aid, when it is not warranted by the premises; as, in assise for rent, if the jury find a demand and refusal [<sup>1</sup>] of the rent, *et sic disseisivit*, without finding a demand on the land, it is not sufficient; for the conclusion is only their deduction from the premises, and therefore it shall not be intended from thence that it was upon the land. R. 2 Rol. 693. l. 50.

And when the jury make a conclusion contrary to what the law and the court would adjudge on the special matter before found, on which their conclusion is founded, the court will judge upon the special matter. Hob. 53. Vide 3 Leo. 112. R. Mo. 105. 269.

As, if the jury find a receipt by the executor of rent due after the death of the testator on a lease for years, and conclude, so assets, the court will adjudge for the defendant; for the rent runs with the reversion. Dy. 362. 2 Rol. 702. l. 5.

If it finds A. seised, that B. entered and leased to the plaintiff, and if A. has title, for the plaintiff, but does not find that B. entered by disseisin, which shall not be intended, and then his lease to the plaintiff is void: though the



jury doubt of nothing but the seisin and title of A., yet the court will not give judgment for the plaintiff. R. 2 Rol. 700. l. 5.

(S 39.) Or, if the special matter be out of the issue.

So, a verdict which finds matter out of the issue, is void for so much, though thereon it concludes generally for or against the plaintiff or defendant. Vide ante, (S 18.)

As, in annuity by prescription, and issue on the prescription, if the jury find the prescription, but that nothing was in arrear, yet judgment shall be for the plaintiff. Hob. 54.

(S 40.) Or, contrary to the general verdict.

So, if a verdict begins with a direct verdict, and afterwards finds special matter, upon which the law will adjudge contrary to the direct verdict, and submits the whole to the court, the court will give judgment according to the special matter. Hob. 53. Vide Dyer, 115. 370. Cro. Car. 212.

As, if the issue be whether A. was taken by a *cap. ad satisfaciendum*, and the jury find that he was not taken by a *ca. sa.* but that on the same judgment he was taken by an *alias ca. sa.* and so, &c. R. Hob. 53. 2 Rol. 695. l. 20.

If issue be on an *assumpsit* to save bail harmless, and the jury find that the defendant assumed, but that the bail was condemned at the suit of another, not in the suit against him for whom he was bail. Semb. Cro. El. 459.

(S 41.) A verdict needs not precise certainty.

A verdict needs not precise certainty; as, if the jury find a commission *secundum formam statuti*, it is sufficient, though it does not shew the statute pursued in all points. 5 Co. 7. b. de J. Eccl.

So, if it finds that it was not parcel, but was demised as parcel, *prætextu cujus fuit* reputed parcel, it is sufficient on issue whether reputed parcel. R. 1 Sid. 191.

{ In ejectment for two parcels of land particularly described, a finding "that the defendant has done wrong and disseisin, in manner and form," &c. "so far as respects the plaintiff's right in his mother's dower; and therefore find," &c. "And as to the residue of the demanded premises, the jury find, that the defendant has done no wrong nor disseisin," is sufficiently certain. Kinney v. Williams, 2 Day, 68.

Certainty to a common intent is sufficient. Green v. Liter, 2 Wheat. 306. }

[\*](S 42.) Nor, certainty in a thing not material.

So, certainty is not necessary in a case where it is not material; as, in debt against an heir who pleads, nothing by descent, if the jury find that he had divers lands, without saying what, it is sufficient; for, for a false plea, there shall be a general verdict against him, without regard to assets. R. 2 Rol. 694. l. 40. 1 Rol. 234.

(S 43.) So, a verdict is aided by a finding to part of the declaration.

So, a verdict may be aided by taking it only upon one part of the declaration, and not upon the whole.

And it may be taken upon any part of the declaration to which the evidence is applicable. Per Holt, 1 Sal. 133.

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If a verdict is given generally for plaintiff, and by mistake, on a count not proved, instead of the count proved, the court will order the verdict to be entered on the right count, and not grant new trial. *Sulston v. Norton*, M. 2 G. 3. 8 B. M. 1235.

**(S 44.) By amendment.**

If the jury find a verdict for the plaintiff with one penalty generally in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former be bad in point of law, and though the evidence would have warranted the verdict on any other count. 3 T. R. 448.

< A *venire de novo* will be awarded to ascertain a fact not controverted before the jury, unless the opposite party will consent to amend the special verdict, by inserting it. *Watson v. Delafield*, 1 Johns. Rep. 150.

Where one count is good, and others bad, and a general verdict, if the evidence has been on the good count only, the verdict may, be amended from the judges minutes. *Union Turnpike Co. v. Jenkins*, 1 Caines' Rep. 381. Vide *Barnard v. Whiting*, 7 Mass. Rep. 358. *Barnes v. Hurd*, 11 Mass. Rep. 57.

So, if it appear from the judge's certificate that the evidence did not particularly apply to the bad count. *Stafford v. Green*, 1 Johns. Rep. 505. >

When a verdict shall be amended, vide Amendment, (P.)

**(S 45.) When a verdict shall be avoided:—by misdemeanor of the jury and parties.**

After the departure of the jury from the bar, they may return into court to hear any evidence of which they are in doubt. 2 Rol. 676. l. 10.

But if the jury examine witnesses by themselves, though nothing is said but the evidence which was given in court, the verdict shall be avoided. R. Cro. El. 411. 2 Rol. 715. l. 20. 1 Leo. 305. R. 2 Rol. 262. Mo. 452. Pal. 326.

So, if a witness delivers to them a bundle of writings, which were shewn to the court, but some of them not read as evidence. R. 2 Rol. 714. l. 10.

Though the jury say, that it was laid aside and not inspected by them; for they ought to inform the court of it. R. 2 Rol. 714. l. 25.

So, if the jury receive money of the party or his agent, after departure, before they have agreed on their verdict, their verdict shall be avoided. Per two J. Wray cont. 1 Leo. 18.

Or, eat or drink at the charge of the party. Co. Lit. 227. 2 Rol. 713. l. 50. 1 Leo. 133.

Or, throw cross or pile, and give verdict accordingly. R. 2 Jon. 83. R. 2 Lev. 140. 205. Barnes, 441. [Com. 525. Pr. Reg. 409. Co. G. 124.]

[\*]If one person, whose name was not in the box, answers for another. *Norman v. Beaumont*, C. P. M. 18 Geo. 2. Willes, 484. Barnes, 453. S. C.

If after the jury are retired they receive papers from one party without consent of the other, the verdict shall be set aside. *Jennings v. Waine*, P. 8 G. 2. B. R. H. 116.

So, if a party, or any for him, delivers a letter or other writing not given in evidence to any of the jury, and a verdict is given for him. Co. Lit. 227. b.

Or, a writing shewn in court, which the judge said was not material to the issue. Cont. per Poph. Qu. per Rol. 2 Rol. 715. l. 15.

Or, a bundle of writings, some of which were read in court, some shewn  
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to the court, but not read in evidence. R. 2 Rol. 714. l. 10. Vide Lit. 69. Pal. 326.

Though the jury say they did not inspect them. 2 Rol. 714. l. 25.

So, if the party gives to any of the jury before he is sworn, an escrow of the evidence afterwards given, which he shews to his companions. R. 2 Rol. 714. l. 45. 715. l. 42. Sti. 383.

So, if the plaintiff says to the jury upon their departure, it is as clear for me as the nose of my face; for this is new evidence, and strongly persuades. R. 2 Rol. 716. l. 10.

A thing of such a nature as will avoid a verdict must be returned on the *postea*, and cannot be surmised. R. Cro. El. 616. 3 Leo. 267. R. 2 Rol. 262. Pal. 325.

The misconduct of the jury in relation to their verdict, cannot be established by a juror's own testimony. 1 T. R. 11. 1 N. R. 326. { Vide Howard v. Cobb, 3 Day, 310. }

And eating and drinking at the charge of the party ought to be alleged before the verdict received and not afterwards. R. Mo. 17. Semb. 15 H. 7. 1. b.

But if such matter appears by affidavit afterwards, the verdict is usually discharged. 2 Lev. 140. 205.

It may be moved after motion in arrest of judgment, on new matter disclosed. Barnes, 441. 443.

And if the thing, wherein the jury misdemean themselves, is by the act of the party who has benefit by the verdict, there shall be a new trial, otherwise the jury only shall be fined. Per Holt, Sal. 645, 15 H. 7. 1. b.

{ So, if the jury separate before they have agreed on a verdict, and afterwards return their verdict, it will be set aside, and a *venire de novo* awarded. Lester v. Stanley, 3 Day, 287. Nichols v. Whiting, ib. in nota. Howard v. Cobb, 3 Day, 310. Vide Anon. 3 Day, 311.

So, if any of the jurors converse with others not of the jury, about the cause before verdict rendered, judgment shall be arrested. Bennet v. Howard, 3 Day, 219. }

#### (S 46.) When not.

But if the jury take with them deeds, &c. given in evidence, it does not avoid the verdict, though it was without the direction of the court. R. Cro. El. 411. Per Holt, Sal. 645.

So, if they take books, writings without seal, &c. given in evidence, without the consent of the parties, or of the court. R. Cro. El. 411. 2 Rol. 715. Co. Lit. 227. Mo. 452.

Though they take them from the party or his agent. R. Cro. El. 411. 2 Rol. 715. l. 10. 50. 716. l. 5.

So, if they take depositions shewn in evidence, though all were not read in court. Lit. 69.

So, if a juror himself shews to his companions a writing not given in evidence; this does not avoid the verdict, if he had it not [\*] from the party or his agent. R. Cro. El. 616. 2 Rol. 715. l. 35. Mo. 546.

So, if the plaintiff speaks to the jury, if he says nothing of the cause. R. 2 Rol. 715. l. 45.

Though one of the parties desire a juror to attend in his cause. Suel v. Timbrell, M. 12 G. Str. 643.

{ So, it is not a sufficient ground for setting aside a verdict, that while the jury had the cause under consideration, one of them said, in the hearing of others, that they had agreed, and were ready to return their verdict into court. Nichols v. Bronson, 2 Day, 211. }

Or, if a juror challenged and withdrawn stands with a jury for half an hour, if he does not give evidence. R. 2 Rol. 85.

So, if the jury eat or drink before the verdict, if it be not at the charge of the party or his agent. Co. Lit. 227. b. 2 Rol. 713. l. 45. 55. R. 1 Leo. 133. 3 Leo. 267. R. Mo. 33. 599. Barnes, 441.

Or, at the charge of the party after they are agreed. Co. Lit. 227. b. 2 Rol. 713. l. 40.

So, if they eat and drink in view of the judge with the consent of the court. 20 H. 7. 3. b.

Though jurymen leave the rest for some time. Wray v. Thorn, C. P. M. 18 G. 2. Willes, 488. S. C. Barnes, 441.

Though a juror be called Henry instead of Harry. Barnes, 454.

A verdict shall not be set aside on affidavit of two of the jurors, that the jury intended to give 7s. only, besides 23l. 7s. brought into court, instead of 23l. 17s. for which the verdict was declared and entered up. Palmer v. Crowle, P. 12 G. 2. Andr. 382.

Affidavit of jurymen confessing they tossed up for verdict, not sufficient. Semb. Barnes, 438.

A verdict, though entered by mistake, is conclusive in a collateral proceeding. 1 East, 355.

### (S 47.) By arrest of judgment.

After verdict a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 Rol. 716. l. 30. 45. 1 Sal. 77.

On an information, under a private statute, a misrecital of the commencement of the parliament is fatal, after verdict, on the plea of not guilty. Doug. 97. n.

So, after interlocutory, before the principal judgment. R. Cro. El. 914. 235. 1 Leo. 309. Cont. 1 Vent. 253. Acc. 2 Mod. Ca. 265.

And judgment shall not be entered till four days after verdict, if there are so many within the term, because the plaintiff may move in arrest of judgment. R. 1 Sal. 77.

Otherwise, if there are not four days within the term. Ibid. Thomas v. Ward, C. P. E. 41 Geo. 3. 2 Bos. & Pull. 393. S. P.

So, any thing which shews the writ abated; but if abateable only, it is not sufficient. 1 Sal. 77.

If on a motion in arrest of judgment there is a rule to stay it, and afterwards the court is divided, there cannot be judgment. 1 Sal. 17.

Otherwise, if the court be divided on the first motion. Ibid.

After verdict, the court will do what they can to help declaration, but not after judgment by default; so, if plaintiff has not averred performance, or readiness to perform what was to be done on his part, judgment shall be arrested. Collins v. Gibbs, M. 33 G. 2. 2 B. M. 899.

[\*] A verdict will not aid, where the gist of the action is not laid in the declaration; but it will cure ambiguity. Cowp. 826. Doug. 683.

In an information for two penalties on two statutes for the same fact, and verdict *pro rege*, and one is bad, judgment cannot be arrested as to part, and given *pro rege* for the other, but must be arrested *in toto*. Rex v. Rosevere, T. 1730. Bunb. 286. 295.

If good notice of trial is given and countermanded, then second notice, but name of cause omitted; this second continued, and name of cause inserted, and cause tried, verdict set aside; the continuance cannot cure the second. Barnes, 297.

If on a bad justification in trespass there is verdict for defendant, yet it shall be set aside, and judgment entered for plaintiff. Barnes, 255.

Where it appears upon the face of the record, that the defendant will be entitled

to recover from the plaintiff the very same sum for which he is suing him, the court will arrest the judgment. 4 T. R. 470.

But he cannot assign error in fact in arrest of judgment. 2 Rol. 716. l. 20.

As, that the plaintiff is an infant, and appeared by attorney. Bro. Attorney, 46.

Judgment after verdict shall not be arrested for an objection that would have been good on demurrer. Thus, in debt on security-bond of a bailiff of G. hundred, conditioned if he duly executes his offices within that hundred, and executes all warrants directed to him, and makes due return, then, &c. plea of performance; replication, that defendant had not duly executed a warrant directed to him, rejoinder he had; verdict against him; he shall not arrest judgment, because it is not alleged that the warrant was directed to him as bailiff of G. hundred. *Weston v. Mason*, T. 5. G. 3. 3 B. M. 1725.

*Per curiam*—after judgment on demurrer, defendant shall not come to arrest judgment on the return of the inquiry, for an exception that might have been taking on arguing the demurrer. *Secus*, in case of judgment by default, or if the fault arises on writ of inquiry or verdict. *Edwards v. Blunt*, P. 7 G. Str. 425.

A defendant cannot move to arrest a judgment awarded on demurrer, whether general or special, on an objection which might have been taken advantage of on arguing the demurrer. 2 Mars. 326. 6 Taunt. 650.

Nor, a matter of record which does not appear by the same record; as, want of an original, warrant of attorney, &c. 1 Sal. 77.

The want of a bill in the King's Bench, and the want of an original in the Common Pleas are both cured after verdict. Cowp. 455.

Nor, can move in arrest of judgment, if the roll where the judgment should be entered, or the *postea* is not in court. Pr. Reg. 147. Mod. Ca. 24. 1 Sal. 78.

So, after judgment *quod capiatur* upon an indictment or information, he shall not move in arrest, for the judgment is final. 1 Sal. 78.

Nor, after a nonsuit. R. Lit. 253.

In B. R. he may move in arrest of judgment within four days after the *postea* brought into court in C. B. only within four days after the commencement of the term. 1 Sid. 36. Lut. 11.

And if judgment is signed before, or on the fourth day, it is irregular, though no execution till after. R. 5 Mod. 205.

Sunday is not esteemed one of the four days within which arrest of judgment must be moved for. M. 7 G. 3. 4 B. M. 2130. Dougl. 745.

Motion in arrest of judgment must be on the appearance-day of the return of *habeas corpus jur.* Barnes, 445.

[\*] If it is to be moved the last day of term, there must be notice given. Barnes, 247.

Defendant in an indictment may move in arrest of judgment at any time before judgment signed. *Rex v. Hays*, T. 3 G. 2. Str. 843.

And now in a civil action in B. R. a motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before judgment is entered up. *Taylor v. Whitehead*, B. R. T. 21 Geo. 3. Dougl. 745.

In B. R. a rule has been obtained to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested, or why a new trial should not be granted. *Cameron v. Reynolds*, B. R. H. 16 Geo. 3. Cowp. 403.

If there is a demurrer to one count, and a verdict for plaintiff on another, judgment cannot be arrested till the demurrer is determined, for till then the proceedings are not complete. *Goodright v. Hodson*, M. 12 G. 2. Andr. 282.

After verdict, the court will suppose every thing right, unless the contrary appears on the record. *Bull v. Steward*, M. 23 G. 2. 1 Wils. 255.

[\*259]



Judgment shall not be arrested because the defendant's name is put in two counts instead of plaintiff's. *Richards v. Simonds*, M. 10 G. 3. 3 Wils. 40.

Judgment shall not be arrested, because in joining issue the defendant's name is repeated, instead of inserting the plaintiff's. *Rawbone v. Hickman*, P. 9 G. 1. *Probyn v. Churchman*, M. 5 G. 2. *Cleaver v. Jordan*, M. 7 G. 2. *Harvey v. Peake*, M. 6 G. 3. 3 B. M. 1793.

The court will not arrest the judgment in an action for words in one count, though some of them be not actionable. *Lloyd v. Morris*, C. P. H. 17 Geo. 2. Willes, 443.

*Secus* where there are two counts, and none of the words in one are actionable, and a general verdict is given for the plaintiff. C. P. H. 17 Geo. 2. Willes, 443.

The provision in the stat. 16 & 17. Car. 2. c. 28. that judgment shall not be arrested by reason of omitting the words *vi et armis* or *contra pacem*, does not operate to supply their place in actions wherein they were never meant to be inserted; nor therefore in one described as "trespass upon the case," and stating a forcible injury. 6 T. R. 125.

{ After verdict, it is no ground of arrest, that the promise, in *indebitatus assumpsit*, is alleged to have been made on a day subsequent to the date of the writ. *Story v. Barrell*, 2 Conn. Rep. 665. }

(S 48.) By an inconsistent verdict upon another issue.

So, a verdict may be avoided by a contrary verdict between others.

But, if there be a verdict in *quare impedit*, that A. was not admitted, &c. upon the king's presentation, a contrary verdict in a right of advowson between the king and others, not parties to the *quare impedit*, does not avoid the verdict in *quare impedit*. R. Cro. Car. 590.

So, if a verdict upon another issue in the same action be inconsistent: as, in trespass against two, if one pleads not guilty, and it is found against him, the other pleads, given by the plaintiff, which is found against the plaintiff, there shall be judgment against the plaintiff on the first verdict also; for the title appears against him. Hob. 54. Mod. Ca. 10. 2 Cro. 134.

Otherwise, if the defendants are sued severally. Hob. 54.

So, in *trover*, if one defendant pleads not guilty, and is found guilty, the other pleads a release, which is found for him, the plaintiff shall not have judgment against him who pleaded not guilty; for, being jointly charged, the release to one discharges both. R. 4. Mod. 379.

{ Vide *Van Deusen v. Van Slyck*, 15 Johns. Rep. 223. }

[\*]So, in an action against two, one is found guilty, the other pleads a justification, whereupon issue is joined on an immaterial point, and the defendant at the trial makes default, whereby being out of court, there cannot be a repleader; the plaintiff cannot have judgment against one, but the action abates against both. Mod. Ca. 10.

A. and B. have mutual demands; each brings action, A. gives notice to set off. B. does not: both causes come on at the same sittings, but A. v. B. first; A. takes verdict for his whole demand, 30*l.*; then B. v. A. comes on, A. offers to set off, but is not allowed, and B. has verdict for his whole demand, 11*l.*; this verdict against A. shall be set aside, with costs of nonsuit; but he shall remit so much of the damages recovered by him as exceeds the balance of the mutual debt. *Brown v. Baskerville*, T. 1 G. 3. 2 B. M. 1229.

But otherwise, if the verdict does not appear inconsistent; as, in trespass against A. and B. one pleads not guilty, the other justifies for preservation of the peace, and it is found for him, and for the plaintiff on the other issue; the plaintiff shall have judgment, for he might be guilty at another time. R. 2 Cro. 134.

*Indebitatus assumpsit* against A. and B. and judgment against A. by *nil dicat*, B. pleads payment, and there is verdict for him, A. shall not be discharged contrary to his own confession. Per Holt, 1 Sal. 23.

(T) POSTEA, &c.

By rule 2 Ja. 2. in C. B. the clerk of assise, &c. shall deliver the *postea* to the prothonotary on the *quarto die post* of the return of the writ of *nisi prius* in bank, on pain of 20*l*.

And he keeps it in the interim, and shall have 6*s*. 8*d*. for his attendance with it before. Mod. Ca. 24.

And he ought not to deliver the *postea* till that time to any except the clerk in court. Ibid.

If the defendant would move in arrest of judgment, he must give notice, and have the *postea* in court.

And a rule upon the *postea*, that it be brought into court, is notice. 1 Sal. 78.

The court will not, at a distance of time after the trial, amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived the verdict they had given was calculated to give him such a sum. 2 T. R. 281.

Where on the argument of a special verdict in ejectment the court of C. P. gave judgment for the lessor of the plaintiff, the court on motion staid the *postea* until the event of a writ of error (which the defendant intended to bring) should be known, on the defendant's undertaking to account for the *mesne* profits from the day of the demise. Roe v. Jones, C. P. T. 28. G. 3. 1 H. Bl. 34.

Where a verdict is reduced under a reference, the plaintiff is entitled to the *postea*, without any application to the court. 1 B. & P. 480.

*Special cases and arguments.*—No special arguments to be entered the last paper day of the term. Lofft. 370.

In a case reserved for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of those facts only. 2 Wils. 163.

[\*] In a case reserved at the trial for the opinion of the court, the court cannot infer any facts beyond those which appear therein. Thus, if a grant is required to be made to take effect in possession, which in its term it does, and the case states that the grantor afterwards remained in possession till his death, the court cannot thence infer that the grant was colourable, and that his remaining in possession was a tacit condition understood when the grant was executed. 3 M. & S. 407.

As a special case is settled before a jury, so it must stand. Lofft. 83.

If parties go to trial prepared with a case drawn for the purpose of taking the opinion of the court, the court, on arguing the case, will not allow a formal objection to be made which was not taken at the trial. 4 T. R. 294.

*Notices.*—All notices in the exchequer must be given and received in the names of clerks in court. 1 Price, 385.

In C. B. notice of motion cannot be served after nine at night. 2 Taunt. 48.

A defective notice is not cured by appearance. Cowp. 30.

Where a notice is a nullity, the party need not apply for relief until notice of some effectual proceeding. 2 N. R. 75.

A term's notice is not necessary to revive proceedings against a defendant who has stayed them by obtaining an injunction. 2 Blk. 784.

Where proceedings are stayed for a time certain above a year, proceedings may go on at the expiration of the time without a term's notice. 2 Blk. 762.

After a year's acquiescence, judgment, as in case of a nonsuit, may be moved for without a term's notice. 2 Blk. 1223.

The rule that a term's notice is requisite where no proceedings have been had for

four terms together, does not apply where the delay has been occasioned by the defendant. 3 T. R. 530.

The signing of a *consilium* is taking a step in the cause within the meaning of the rule, which requires that a term's notice be given of any intention to proceed, where the plaintiff has taken no step in the cause for four terms together. 3 T. R. 530.

The rule requiring a term's notice where no proceedings have been had for four terms together, does not apply to a motion for judgment as in case of nonsuit. 5 T. R. 634.

Any step or proceeding within the year, though not followed up, supersedes the necessity of a term's notice; thus, a notice in Hilary vacation (within the year) that after Easter term the plaintiff would proceed in the cause; in which case, therefore, the common notice of trial, instead of a term's notice, is sufficient. 8 East, 1.

A term's notice is not necessary where there have been no proceedings during four terms after verdict. The reason why such notice is required before verdict, is, that whilst the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice that he may prepare himself; but when the matter has passed in *rem judicatum* by the verdict, the same reason does not apply. 3 M. & S. 500.

After proceedings have been delayed for a year, it is not necessary to give a term's notice of intending to proceed, but only a term's notice of the next proceeding. 3 Smith, 101.

The rule requiring that a term's notice shall be given where there have been no proceedings for a year, comprehends that term only, and not the ensuing vacation. So that judgment may be signed in such vacation. 2 T. R. 40.

*Motions.*—What regularly is to be had on plea ought not to be taken upon motion. Lofft. 65.

[\*] A defendant arrested is not in court, and therefore cannot make any application to the court until he has put in and perfected bail; hence, until that event, he cannot move to stay proceedings in an action on a judgment pending error thereon. 5 T. R. 9. 6 T. R. 455.

A motion to answer the matters of an affidavit, cannot be made on the last day of term. 4 Burr. 2502.

The paper books must be delivered to the judges before a *consilium* can be moved for. 2 Anst. 499.

The court will not appoint a re-argument after a decision, in the absence of the crown officer, to give him an opportunity of being heard. 2 Price, 5.

*Rules in causes.*—The court will not, generally, grant a rule to show cause on the last day of the term, where it would operate to stay proceedings. 2 Price, 143. If the motion could not have been made before, they will. 2 Price, 143. When it must be drawn specially for the last day. Lofft. 436.

Though a rule for time be not served, yet if no advantage be taken of it, the irregularity may be saved by a subsequent service. 1 Blk. 290.

Enlarged rules are not served, because both parties are before the court. 1 Smith, 99.

Where the name and place of abode of the attorney is mentioned in the book kept under the rule of court of K. B. Hil. 1768, service must be there. Lofft. 857.

The counsel obtaining a rule, against which cause is shewn in the first instance, has a reply in support of his rule. 4 Taunt. 690.

An original rule cannot be made absolute until the day following that for which it is drawn up; an enlarged rule may be made absolute on the very day. 2 Taunt. 174.

One party cannot compel the other, having obtained a rule to draw it up. 4 Taunt. 883.

Where an original proceeding is void, an application to set aside, as well the original as proceedings subsequent, may be made by one rule; thus, to set aside

proceedings against the principal and the bail, an irregular judgment and an action or execution thereon; and the like. 4 T. R. 688.

If a party, after due notice of a rule, suffers it to be made absolute, he cannot open it. 6 T. R. 596.

Where a plaintiff, secure of the verdict, agrees to a modification of his right in favour of the defendant, whereupon the parties enter into a rule of court for that purpose, the rule will not be opened. 5 Taunt. 628.

A consent to be bound by a verdict in one cause out of several, upon the same question, means such a verdict as the court thinks ought to stand as a final determination of the matter. 3 Burr. 1477.

*Rules of court.*—Rule as to the time of serving rules, &c. K. B. Mich. 41 Geo. 3. 1 East, 182.

Rule as to enlarging of rules, K. B. 3 Burr. 1842.

*Proceedings before a judge.*—A judge's summons stays nothing unless it is returnable before the judgment may be regularly signed. 2 Blk. 954.

A summons for time to enter the issue, is, when returnable, a stay of proceedings. 2 N. R. 169.

Where bail have time to justify at chambers, a summons for further time is a stay of proceedings. 6 Taunt. 240.

Where a summons is obtained for time to plead, and indorsed, the defendant must draw up and serve the order, or it will be null, and the plaintiff may sign judgment. 3 Smith, 559. 7 East, 542.

Unless the order on a judge's summons be drawn up and served, the consent indorsed is of no avail. 4 Taunt. 253.

[\*]In K. B. a judge's order, that "upon payment of debt and costs by a certain day, proceedings should be stayed," is optional with the defendant. 11 East, 319.

It is improper, after one judge has refused an application, to apply to another. Any further application should be made to the court. 5 Taunt. 850.

Rule regulating the duration of attendance on a judge's summons. K. B. Trin. 35 Geo. 3. 6 T. R. 402.

*Special Cases.*—Rule as to the entry and setting down of special cases for argument. K. B. Mich. 38 Geo. 3. 7 T. R. 454.

*Peremptory paper.*—Rule as to the disposal of causes in the peremptory paper. K. B. East, 41 Geo. 3. 1 East, 496.

*Proceedings before the Master.*—Rule relative to proceedings on an appointment by the master. K. B. Hil. 32 Geo. 3. 4 T. R. 580.

## (V) CONTINUANCE OF SUIT OR PROCESS.

### (V 1.) When necessary.

After appearance the suit must be continued, till judgment from one term to another.

So, if the term be adjourned from *oct. Mich. ad mens. Mich.*, there ought to be a continuance entered from one day to the other. R. 1 Rol. 486. l. 20.

If the plaintiff declares in Michaelmas term, and after imparlance to another term, declares *de novo*, as the course is in C. B. there ought to be a continuance from one term to another. R. Cro. El. 412.

Defendant in custody on *ca. sa.* discharged on written agreement; above a year after, new *ca. sa.* issues, without continuance on the roll; it shall be set aside. Barnes, 205.

On *nul tiel record*, plaintiff may continue the day for bringing in the record. Barnes, 84.

If judgment be on default or demurrer in B. R. and a writ of inquiry awarded, a continuance shall be entered from the first to the second judg-

ment; for the first is only an award. R. 1 Rol. 485. l. 50. R. Yel. 97. R. 11 Co. 6. b. Dub. 1 Rol. 408.

But after default the continuance in B. R. is only by *dies dat.* to the plaintiff; for the defendant is out of court. R. 1 Rol. 486. l. 5. 16. R. 1 Sid. 16. Mod. Ca. 9.

And in C. B. no continuance is necessary after judgment by default, till judgment on the writ of inquiry. R. 1 Rol. 486. l. 7. R. 11 Co. 6. b. Acc. Cro. El. 144.

Nor, in B. R. where the writ of inquiry is returnable in the same term. R. 1. Rol. 486. l. 4.

So, in an inferior court there must be a continuance from one court to another, after the writ of inquiry awarded. R. Yel. 97. Noy, 120, viz. by day to the plaintiff.

And, if judgment be confessed at one court, and not entered till the next court, there shall be continuance to that court. R. 1 Rol. 486. l. 10.

So, in a writ of error, after the parties appear and proceed, it must be continued.

[\*]An attachment of privilege is not a continuance of a bill of Middlesex, so as to avoid the statute of limitations. *Smith v. Bower*, B. R. T. 30 Geo. 3. 3 T. R. 662.

### (V 2.) When not.

But, if the sheriff on a *pluries replevin* in Mich. term returns a claim of property, but nothing is done till Easter term, and then the defendant appears and pleads, and judgment is given, default of continuance from Mich. to Hilary term is no error, for till appearance there can be no discontinuance, for the parties have no day in court. R. 1 Rol. 485. l. 25.

So, after final judgment there need not be any continuance. R. 1 Rol. 485. l. 55.

So, between verdict and judgment there need not.

And, therefore, if issue be joined by one defendant, and verdict thereon, and a demurrer by the other and several continuances entered to the demurrer, but none after the verdict, and then there is judgment on both, it is no error. R. 1 Rol. 485. l. 35. R. Cro. Car. 236.

So, if on a plea after the last continuance at *nisi prius* the jury is dismissed, and no continuance is entered till the day in bank, it is no error; for the day at *nisi prius* and in bank are the same day. R. 1 Rol. 485. l. 40.

Continuance need not be entered in record of *nisi prius*; therefore, if after issue joined, and before day of *nisi prius*, one of defendants die; suggestion of it, and *venire fa.* between plaintiff and surviving defendant, and *jurala* at the foot agreeable thereto, is good. Barnes, 469.

So, in the courts of London it is not necessary, though it is in other inferior courts. 2 Sho. 424.

### (V 3.) How it shall be entered.

The continuance ought to be to a time certain; as, to the next term, &c. Semb. 3 Bul. 233.

So, in an inferior court, which ought to be held at a day certain; as, from three weeks to three weeks, &c. the continuance must be to the next court, viz. on such a day. R. 1 Rol. 481. l. 35. Dy. 262. b. R. 2 Cro. 571. R. Cro. El. 105.

And it is not sufficient to say at the next court generally, though it be said



*ad quam proximam curiam, scil.* such a day, &c. R. 1 Rol. 484. l. 35. Cont. R. 1 Rol. 486. l. 35. Cro. Car. 254.

But, if the court is to be held when bailiffs please, &c. it is sufficient to make the continuance to the next court. R. 1 Rol. 484. l. 25. Cro. Car. 254.

So, in Chester, they are to the next court generally, and not to a day certain. Sho. 95.

So, a continuance in an inferior court must say, *coram quo* the next court is to be held. Sho. 319.

So, continuances must be entered from one term to another, without intermitting a term, and therefore the continuance of a plea on the prayer of the defendant, though one term or more *mesne*, is bad. R. 1 Rol. 484. l. 42. Sti. 339. R. 2 Cro. 304.

[\*]So, a continuance by *cur. adv. vult.* intermitting a term, is a discontinuance. R. 1 Rol. 484. l. 45.

So, if the term is adjourned to another day in the same term, as from *tres Mich.* to *mens. Mich.*, the continuance ought to be to *mens. Mich.*, and not to *oct. Hil.* otherwise it will be a discontinuance. R. 1 Rol. 130. l. 10.

So, if day be given, on *nul tiel record*, from Easter term to Mich. term, as it may, yet continuances ought to be entered from Easter to Trinity, and so to Mich. term, otherwise it is error. R. 1 Rol. 485. l. 5.

So, a *capias* cannot be continued, intermitting a term; for the defendant shall not stay in prison. 1 Rol. 484. l. 20. Dyer, 175. a. Sal. 700.

Nor, a *capias ullagatum*. Cro. El. 467.

So, in an appeal, if the process leaves a day between, it will be a discontinuance; for if the original was returnable *quind. Mich.* which was 16 Oct. the *capias* must be tested the same day; for if it be tested 17 Oct. or the next return, though all in the same term, which is but one day in law, it will be bad. R. 2 Cro. 284. Yel. 205. 1 Bul. 142.

But an original may be returnable two or three terms after the *teste*; for the defendant has no prejudice. 1 Rol. 484. l. 15. Dy. 175. a.

So, a *distringas*. Dy. 175. Bro. Jour. 71.

So, in a writ of execution, the justices may give day at their will; as, in a *scire facias* to execute a fine. 1 Rol. 484. l. 32.

So, in *exigent, grand cape*, or other process in real action; for five counties, nine returns, &c. cannot otherwise intervene, as they ought, between the *teste* and return. Dal. 104.

So, in a *capias ad satisfaciendum*, or other process in execution; for no return is necessary. R. Sal. 700. Vide Return, (F 1.)

So, in an inferior court, if the continuance is by *idem dies*, instead of *eadem hora*, it will be good. R. Mo. 459.

So, if the continuance be to *tres Mich.*, and nothing done after till *quind. Mart.* there is no discontinuance, for it is all in the same term.

If to declaration of Trinity there is imparlance to Michaelmas term, and defendant procures judge's order for time to plead till 15th December, the imparlance shall be continued to *quinden*. Mart. Barnes, 161.

A continuance may be entered on the plea roll. R. 2 Cro. 304.

Or, on the roll of the *venire* after issue. 2 Cro. 304.

If proper continuances are entered on the plea-roll, the want of them on the *next prius* roll is not material. French v. Wiltshire, M. 11 G. 2. Andr. 67.

When the trial is deferred, if the *venire facias* is returned and filed, the proper entry is, that the jury *ponitur in respect.*; if it be not filed, enter a *non minit breve*; either way will prevent a discontinuance. Rex v. Hare and Man, H. 6 G. Str. 266.

[\*265]

(V 4.) At what time.

By the course in B. R. the continuances are used to be all entered, after issue or demurrer before judgment, on the back of the roll. R. 1 Rol. 485. l. 15.

[\*]And, if the plaintiff will not enter the continuances to avoid costs, if judgment should be against him, the defendant may enter them. 1 Rol. 487. l. 30. 1 Leo. 105.

If bill is of Easter, and in Trinity defendant pleads, and issue joined, and paper-book delivered without continuance from Easter to Trinity, it shall not be set aside; for it may be entered at any time on the roll. Wilkes v. Wood, M. 4 G. 3. 2 Wils. 203.

So, if the continuances are not entered, the court may amend the roll by ordering them to be entered at any time before judgment. R. in *scire facias*. 3 Lev. 430.

So, till the plea roll, no advantage shall be taken for default of entering a continuance. 1 Sal. 179.

So, before judgment, there shall be no discontinuance against the king; for as to matters to which there was no plea, the attorney general may take issue, or enter a *nolle prosequi* at his election. Hard. 504.

So, continuances may be entered on a *latitat*, or original, to avoid the statute of limitations, after the statute pleaded. 1 Sid. 53. 60.

Or, on a *fieri facias* or *elegit*, many years after, when a new *fieri facias* is awarded, to save a *scire facias*. 1 Sid. 59.

So, in C. B. a continuance shall be allowed to be entered within a year after issue. Sav. 54.

So, in the Exchequer.

But, it is in the discretion of the court to permit an entry of continuances or not. R. Sav. 54.

And they will grant leave, after verdict, to arrive at the justice of the case. Mears v. Dollman, B. R. E. 38 Geo. 3. 7 T. R. 618.

(V 5.) By what words.

If process be tested in one term and returnable in another, it is a sufficient continuance from one term to the other. 1 Rol. 484. l. 15.

So, by an imparlance from one term to another.

By *prece partium*.

By *dies datus*. 3 Leo. 14.

By *curia advisare vult*.

By *vicecomes non misit brev*. Lut. 290.

By *jur. ponit. in respectu*. Yel. 97.

So, if an appeal, &c. before justices of gaol-delivery be removed by *certiorari* into B. R. by the return of the *certiorari* a discontinuance is prevented, though it be *sine die*. R. 1 Sal. 62.

But in a writ of inquiry there cannot be a continuance by *jur. ponit. in respectu*, but only by *vicecomes non misit brev*. R. Yel. 97. Noy, 120.

(W) DISCONTINUANCE.

(W 1.) What shall be.

If the continuances are not properly entered, the suit is discontinued, which is error.

It is not a discontinuance, though no day is given to the tenants in dower to ap-  
[\*266]

pear on the return of the writ of inquiry, or it is aided by stat. 4 & 5 Ann. c. 16. Dobson v. Dobson, P. 7 G. 2. B. R. H. 19.

[\*](W 2.) To part.

So, if a plea or replication does not answer to the whole matter of the bar or declaration, it will be a discontinuance for the whole. Vide ante, (E 1.—F 4.)

In *assumpsit* for three several sums of 36l. the defendant pleads as to two several sums of 36l., it is a discontinuance. Woodward v. Robinson, P. 6 G. Str. 302.

But though a plea doth not answer the whole promise, and is therefore a naughty plea, yet if it is pleaded *quoad* the whole promise, it will not make a discontinuance; and *vice versa*. Ibid.

So, if a demurrer or issue does not go to the whole. Vide ante, (Q 3.)

So, if a day be given to the plaintiff, but the *idem dies* to the defendant is omitted, it will be a discontinuance. R. 1 Rol. 486. l. 30. 50.

Otherwise, where it is the king's suit, and a day given to the defendant, but *idem dies* to the plaintiff is omitted: for the king is always present. R. 1 Rol. 487. l. 3. Cro. Car. 390.

If the demandant omits in his demand a part contained in the original, it is a discontinuance for the whole. 1 Rol. 487. l. 35.

So, if the defendant vouches for part, and says nothing for the residue. 1 Rol. 487. l. 40.

Or, if process on voucher goes only to parcel. 1 Rol. 487. l. 42.

So, if the plea be in bar, and after replication the defendant demurs, and concludes in abatement. 1 Sal. 4.

So, in *replevin*, on a taking in two places, if the defendant answers only to one. R. 1 Sal. 94. 179.

So, if the plaintiff in a replication to a plea in abatement concludes with praying debt and damages. R. 1 Sal. 177. Carth. 138.

Or, to a plea in abatement demurs in bar. R. 1 Sal. 218.

So, if the plaintiff demurs to the defendant's demurrer to his declaration. R. 1 Sal. 219.

But if there be a discontinuance, the plaintiff need not take judgment; for if he joins in demurrer, the court will give judgment for him. R. 1 Sal. 4.

So, if there be an issue for part, and a discontinuance for other part, the court will not give judgment against the plaintiff, till issue tried; for the discontinuance will be aided by a verdict. 1 Sal. 218.

Where in an action of *assumpsit*, on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the first count, and discontinues as to the others, after a verdict for the plaintiff, the defendant shall not take advantage of his own mispleading in arrest of judgment. Harvey v. Richards, C. P. T. 31 Geo. 3. 1 H. Bl. 644.

*Assumpsit* against three; two pleaded a debt of record by way of set-off. The plaintiff replied *nil tunc record*, and gave a day to the two defendants, but entered no suggestion respecting the third. It was holden on demurrer, that the action being discontinued, judgment must be given against the plaintiff, even though the defendant's plea were bad. Tippet v. May, C. P. E. 39 Geo. 3. 1 Bos. & Pul. 411.

So, if the plea does not cover the whole, and plaintiff replies, and defendant demurs; though it is a discontinuance, yet, if it be a record of the same [\*]term, plaintiff may take judgment by *nil dicit* for what is uncovered. Woodward v. Robinson, P. 6 G. Str. 302.

So, in a suit by the king, as *quo warranto*, &c. if there is an issue for part, and nothing said to other part, it will not be a discontinuance; for the at-  
[\*267] [\*268]

torney-general at any time before judgment may proceed, or enter a *nolle prosequi*, for the other part. Hard. 504.

{ After judgment for plaintiff, on demurrer to the whole declaration, and assessment of damages, the plaintiff cannot enter a *nolle prosequi*, as to one count, and take judgment on the others, but should obtain leave of court, before awarding the writ of inquiry. Backus v. Richardson, 5 Johns. Rep. 476. }

### (W 3.) To one person.

So, in an action against several, a discontinuance of the process against one defendant is a discontinuance to all. 1 Rol. 488. l. 10. R. Cro. El. 762.

{ But in a suit against husband and wife on a bond executed by them jointly, the plaintiff may enter a *nolle prosequi* as to the wife, on payment of costs. Pell v. Pell, 20 Johns. Rep. 126. }

So, in error on an outlawry for felony, if a *scire facias* goes against the mediate lords, and there be a continuance as to the king and party, but not as to the lords, it is a discontinuance as to all. 1 Rol. 488. l. 15.

But, if there are several *præcipes* in a writ against several, a discontinuance as to the defendant in one *præcipe* is no discontinuance to the others. 1 Rol. 488. l. 25.

So, it will be a discontinuance, though day be given to him, who was not in court: as, in an inferior court, if the defendant be essoigned, and at the day makes default, and day be given to him, upon his default, to the next court, it will be a discontinuance, though day be given to a subsequent court by the custom of the court; for there cannot be a custom contrary to the law.

So, if day be given to the defendant by *essoign*, and *idem dies dat. querenti* be omitted, it will be a discontinuance. R. Carth. 172.

### (W 4.) The effect of a discontinuance.

A discontinuance shall be peremptory: as, in an appeal. Carth. 56.

Discontinuance or miscontinuance of a plea or process is error. 1 Rol. 485. l. 20.

And discontinuance of process shall not be aided by appearance. 2 Cro. 284. D. cont. Sho. 319.

But, misconveying of process, viz. of one process for another, or misreturn, may be aided by the party's appearance. 2 Cro. 284.

{ A discontinuance, will not, in all cases, disable the party from bringing a second action; this must depend upon the circumstances of vexation attending the case. Doane's Admrs. v. Penhallow, 1 Dall. 220. Per SHIPPEN, Pres. }

### (W 5.) When it shall be by leave of the court.

But the plaintiff may discontinue his suit by leave of the court.

Rules should be drawn up, "have leave, or be at liberty" to discontinue, not "shall discontinue." Barnes, 170.

So, if plea is not continued upon the roll for a year after demurrer, the court usually grants a discontinuance upon the prayer of one party, if the other does not pray the contrary. 1 Rol. 487. l. 25.

Yet, if the other prays the contrary, it is in the discretion of the court. 1 Rol. 487. l. 27.

The court may grant it after special verdict argued, but will not do it in a hard action. *Boucher v. Lawson*, H. 9 G. 2. B. R. H. 194.

They will not permit the plaintiff to discontinue after a special verdict, in order to adduce fresh proof in contradiction to the verdict. 2 Bl. 815.

[\*] Plaintiff may discontinue, though defendant has been arrested a second time before discontinuance. *Barnes*, 169.

The court will not permit an executor to discontinue in any case where he has knowingly brought his action wrong, but on payment of costs. *Harris v. Jones*, H. 4 G. 3. 3 B. M. 1451.

< But if the action be brought by mistake, an executor may discontinue without costs. *Phoenix v. Hill*, 3 Johns. Rep. 249.

So, the plaintiff may discontinue without costs, if the defendant be sentenced for felony. *Lackey v. M'Donald*, 1 Caines' Rep. 116.

So, if he become insolvent, and has obtained his discharge. *Hart v. Story*, 1 Johns. Rep. 143. *Collins v. Evans*, 6 Johns. Rep. 333. Vide *Shawe v. Wilmerden*, 2 Caines' Rep. 380. *Ludlow v. Hackett*, 18 Johns. Rep. 252.

But if the plaintiff know of the discharge, and proceed in the cause, he shall pay costs if he afterwards discontinue. *Ludlow v. Hackett*, *ut supra*.

But the plaintiff cannot discontinue without costs, where the defendant has enlisted into the army, if the debt exceed 20 dollars. *Reynolds v. Lammond*, 3 Johns. Rep. 445. >

The court will give leave to executor to discontinue without paying costs, after undertaking to try peremptorily, he having discovered there was a deed against him; and being bound not to bring new action without leave. *Bennet v. Coker*, M. 7 G. 3. 4 B. M. 1927.

After rule for judgment *nisi*, the plaintiff shall not be allowed to discontinue. 1 Sal. 179.

And, after issue and a verdict for him, the plaintiff cannot discontinue without the consent of the defendant; for if the plaintiff will not enter up judgment, the defendant may. R. 1 Rol. 487. l. 25. Sal. 178.

Nor, after demurrer joined without leave of the court. 1 Bul. 217. Anciently. 1 Sal. 179.

But, after demurrer argued, the court have permitted a discontinuance on payment of costs, where there was a misprision in the plaintiff in point of pleading. 2 Lev. 124. 209. 1 Lev. 191, 192. 3 Lev. 440.

And this in escape. 1 Sid. 306.

After demurrer argued and allowed, on payment of costs. *Butler v. Malissy*, H. 4 G. Str. 76. *Henderson v. Williamson*, M. 5 G. Str. 116.

After judgment on demurrer for plaintiff, and error brought, plaintiff may discontinue on costs in action and error. *Barnes*, 169.

So, after a special verdict; for it is not complete, but is *de gratia*. *Semb.* 1 Sal. 178.

So, after a writ of inquiry executed and returned, the plaintiff cannot discontinue without the defendant's consent, though it be not filed. R. Sho. 63. *Carth.* 86, 87.

After judgment on demurrer in replevin for avowant, plaintiff cannot discontinue. *Barnes*, 169.

Whether discontinuance may be entered without leave? Qu. *Barnes*, 170.

Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other cases. *Barnes*, 257.

Plaintiff cannot move to discontinue, after defendant has moved for judgment as in case of nonsuit. *Barnes*, 316.

Also, whether plaintiff in replevin can discontinue? Qu. *Barnes*, 171.

Serving a rule to discontinue does not of itself discontinue an action, but there must also be an appointment to tax the costs. *Whitmore v. Williams*, B. R. T. 36 Geo. 3. 6 T. R. 765.

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< Where there is a discontinuance without leave, the defendant cannot obtain his costs on motion; but must proceed to non pros the plaintiff. *Leonard v. Slaughter*, 10 Johns. Rep. 367. >

A suit is not regularly discontinued so as to warrant a second action for the same cause, until the costs have been taxed and paid. A tender by the plaintiff before taxation, of a sum sufficient to cover the costs, is of no avail. 3 M. & S. 152.

Where an order is obtained for staying proceedings on payment of a sum and costs; the plaintiff may take out the money, and on non-payment after taxation, may proceed without any previous demand. 2 N. R. 473.

Side-bar rule to discontinue, obtained after the bail had justified, discharged to meet an unfair attempt. 4 Burr. 2502.

< When a discontinuance shall not be permitted. The plaintiff cannot discontinue after an assignment of the debt for a valuable consideration. *M'Cullum v. Cox*, 1 Dall. 139.

So, in replevin, where the goods are delivered to the plaintiff, the court will not give leave to discontinue. *Brown v. Fox*, 2 Yeates, 530.

So, in some cases, where the defendant claims property, and the goods remain in his hands. *Brown v. Fox*, *ut supra*. >

### [\*](W 6.) When it shall be aided, &c.

By the st. 32 H. 8. 30. after verdict, judgment shall proceed notwithstanding any miscontinuance, discontinuance, misconveying of process, &c. Vide Amendment, (I.)

This statute extends to discontinuance in a penal action. Doug. 115. (100.)

This stat. extends to discontinuances made after verdict; as, if the original process is returnable at a common return, and the *scire facias* in error is returnable at a day certain, this discontinuance is aided by the statute. *Bern v. Bern*, M. 8 G. 2. B. R. H. 72.

So, by the st. 4 & 5 An. 16. judgment by confession, *nil dicit*, *non sum informatus*, or writ of inquiry.

But before this statute it was not aided upon a general demurrer. Vide ante, (E. 1.)

Nor, now upon a special demurrer.

If after judgment by default on a bill against an attorney in C. B. where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is miscontinuance, and aided by the statutes. *Launder v. Cripps*, H. 6 G. 2. Str. 947. Vide post, (3 B 16.)

*Continuance day*.—In K. B. the continuance day is a day fixed by the master at his discretion after each term, regulated by the convenience of the officers of the court for the dispatch of business. 1 East, 405.

*Staying proceedings*.—Proceedings will be stayed where the cause appears to be for less than 40s. and there is an inferior jurisdiction competent to decide it. 2 Blk. 754.

The st. 6 Edw. 1. c. 8., prohibits suits in the superior courts for a sum under 40s. The court, where the fact does not appear on the record, will stay the proceedings, even after notice of trial, upon an affidavit, not denied, that the demand is for less than that sum. 4 T. R. 493. 5 T. R. 64.

Having delivered a bill charging the damage sustained at less than 40s. is a sufficient ground for staying proceedings in case where the county court have jurisdiction. 2 N. R. 84.

On a motion to set aside proceedings as *infra dignitatem* on an affidavit that the demand sued for does not amount to 40s., the court will not inquire into the amount, if an affidavit be put in, on shewing cause, that the demand exceeded that sum, but will at once discharge the rule with costs. 2 Price, 8.

If an action be brought collusively, to obtain the opinion of the judges upon a

doubtful question ; on discovery, proceedings will be stayed. 1 Blk. 80r. 4 Burr. 2327.

Proceedings will not be stayed until satisfaction of a former judgment obtained by defendant. 1 H. B. 10.

The pendency of a bill in chancery for the same cause, is no ground for staying proceedings. 2 B. & P. 137. Nor the pendency of a petition in parliament. Lofft. 436.

C. B. will not stay proceedings to abide the judgment of the mayor's court, in an action for the same property. 6 Taunt. 74.

A plaintiff will be restrained proceeding for the same cause in another court, pending a consolidation rule under which his action has been stayed. 1 Taunt. 565.

Where pending an order made by one court, a party sues in another, the latter causes stay the proceedings. 1 B. & P. 365.

In *replevin* or *trover*, or the like, it is a matter of course to stay proceedings upon payment of costs and of the distress, and delivering up the *replevin* bond, in the first case, and upon payment of costs and restoring [\*] the goods in the other ; unless the plaintiff elects to proceed for the special damage. 3 M. & S. 525.

A proceeding stayed, or set aside on terms, may continue on until the terms are performed. 5 Taunt. 1.

*Setting aside proceedings.*—In C. B. where the plaintiff delivers a declaration after being out of court, from neglecting to declare before the end of the second term, the declaration only, not the process, will be set aside. 5 Taunt. 649.

*Waiver of irregularities.*—A party does not waive an irregularity, if he applies as soon as he has an opportunity. 2 T. R. 719.

In mere matters of practice, delay is an answer to any objection of irregularity. 3 T. R. 10. Lofft. 236. 323. 333.

The general rule is, that a party in a cause waives an irregularity, unless he objects to it in the first instance. 4 T. R. 577.

Where the proceedings in a cause are not merely irregular, but void, the objection need not be taken in the first instance ; as where A. has been holden to bail, on a single affidavit against himself and B. for separate causes of action. 5 T. R. 254.

A party waives an irregularity by neglecting to object until his adversary has taken a further step in the cause. 2 Taunt. 243.

If a party lies by after an irregularity in the proceedings, and knowingly permits the other to take a further step in the cause, before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself would be. 2 Smith. 391.

All motions to annul proceedings on the ground of irregularity, must be made in the term when the proceeding was had, or the court will not receive the application. 3 Price, 37.

A plea that in the plaintiff's election may be treated as a nullity, is a waiver of antecedent irregularities. 6 East, 549.

*Waiver of rights connected with practice.*—A defective plea, whether in itself, the manner in which it is delivered, or otherwise, is equally a waiver with a valid one of rights, on which the defendant might have insisted ; such as a right to implead, and of a rule to plead. 5 T. R. 661.

*Paper book.*—On a rule to return the paper book on a particular day, it must be returned some time in that day, otherwise the other party may sign judgment without waiting till the opening of the office the morning following. Dougl. 197.

Rule as to the time for delivering paper books in cases entered for argument, K. B. Trin. 40 Geo. 3. 1 East, 131.

Rule as to the delivery of paper books to the judges on special arguments. C. B. Mich. 49 Geo. 3. 1 Taunt. 412.

Rule as to entering exceptions in the margin of paper books. C. B. Hl. 48  
Geo. 3. 1 Taunt. 208.

(X) NONSUIT, &c.

(X 1.) What shall be.

If the demandant or plaintiff does not appear at the day when he is demandable, he shall be said to be nonsuited, *quia non est prosecut'*, &c. Co. Lit. 138. b.

And this may be before the defendant's appearance: as, at the return of the writ. Co. Lit. 138. b.

Or, if the plaint is removed by *pone*, at the return of the *pone*. Yel. 2.

[\*] So, at the return of an assize, if the plaintiff is not ready to make plaint, on demand of the tenant, he shall be nonsuited. R. Sal. 82.

And the plaintiff may be demanded the day of the return of the writ, though the defendant not till *quarto die post*. R. Carth. 172.

Or, he may be nonsuited after appearance: as, at any day of continuance; for the plaintiff is then demandable, and is the first agent. Co. Lit. 138. b.

So, at the day of *nisi prius*.

So, at the day given by *cur' advisare vult* after demurrer. Co. Lit. 139. b. 1 Leo. 105.

So, after an interlocutory judgment, as *quod computet*, &c. Co. Lit. 139. b.

But, by the st. 2 H. 4. 7. at the day by *cur' advisare vult* after a verdict, the plaintiff cannot be nonsuited. Co. Lit. 139. b.

In replevin, if plaintiff does not appear at trial, but defendant brings down record, nonsuit shall be entered, and not verdict for defendant; if it is, it shall be so amended at defendant's cost. Barnes, 458.

None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cause called, and jury sworn, the only way is to discharge the jury. Arnold v. Johnson, H. 6 G. Str. 267. Smith v. Whistler, T. 9 G. 2. B. R. H. 305.

If it appears on the record, that no issue is joined, the jury must be dismissed. Heath v. Walker, T. 12 G. 2. Str. 1117.

A nonsuit at *nisi prius* must be recorded by the judge of *nisi prius*, and cannot afterwards be recorded in bank. Gardener v. Davis, P. 24 G. 2. 1 Wils. 301.

If a judge of assize directs nonsuit erroneously, there is no remedy. Barnes, 311.

If plaintiff dies after nonsuit, and before day in bank, it is not helped by the statute, but is error. Barnes, 312.

Rule to declare in C. B. must be in the office where plaintiff's attorney practices. Barnes, 312.

*Non pros* for want of declaration demanded in the country, shall be set aside. Barnes, 311.

If after the expiration of a four day rule to bring in the issue roll, and after search by the defendant it is brought in, before judgment of *non pros* is signed, it is irregular to sign judgment afterwards. By neglecting to insist upon his right, the defendant gives the plaintiff an advantage from which he might otherwise have excluded him. 1 T. R. 26.

The privilege given by st. 13 Car. 2. st. 2. c. 2. of signing judgment of *non pros* for want of a declaration within two terms, is without an exception. 7 T. R. 26.

By judgment of *non pros*, the plaintiff is out of court as to all the defendants. Dougl. 169.

On a bill of Middlesex, returnable early in Michaelmas term, the defendant filed common bail after the essoin-day of Hil. term, but before the first day in term. Held, he might sign judgment of *non pros* though he did not give notice of filing common bail. 2 Smith, 405. 6 East, 314.

The defendant removed the replevin by *re. sa. lo.* which was filed on the appearance day of the return, and a rule to declare given. Held, that judgment of *non pros* might afterwards be signed without demanding a declaration. 1 H. B. 218.

A *non pros* in the case of joint defendants, must be by all jointly. 4 Burr. 2418. Dougl. 169.

[\*] If in process not bailable, two defendants are joined, and the plaintiff declares, or takes out a rule for time to declare against one only, the action has now become separate against each, so that the other alone may, in due course, sign judgment of *non pros*. 2 T. R. 257. Id. 258.

Semble, that a nonsuit cannot be entered against the plaintiff's consent. 2 T. R. 281.

If in an action, *ex contractu*, against two, the plaintiff has judgment against one, he cannot be nonsuited as to the other; thus, where in *assumpsit* against two, one suffers judgment by default, and the other has a verdict. 3 T. R. 662.

There may be judgment of nonsuit against the plaintiff notwithstanding, and previous judgment against him on demurrer to a plea. 10 East, 366.

There may be a judgment, as in case of a nonsuit, against an executor plaintiff, for not going on to trial, but without costs. Willes, 316. Barnes. 130.

The plaintiff is not, by being nonsuited, out of court. 3 T. R. 2.

If a cause is tried by *proviso*, there must be a rule given in the office, *fiat nisi prius per proviso si querens fecerit defaultam*; and if there is not, and plaintiff is nonsuited, the nonsuit shall be set aside. *Dodson v. Taylor*, M. 10 G. 2. Str. 1055.

Where the defendant might have carried down the record by *proviso*, there cannot be judgment as in case of a nonsuit; not, therefore, where the plaintiff having been nonsuited at the first trial, a new one is granted. 1 T. R. 492.

If the plaintiff has once carried down the record to trial, this satisfies the statute 14 Geo. 2. c. 17.; so that, if it becomes necessary to carry it down a second time, as where the cause is made a *remanet* with the defendant's consent, which the plaintiff omits to do, the defendant cannot have judgment as in case of a nonsuit. 3 T. R. 1. 1 H. B. 101.

By stat. 14 G. 2. c. 17. if plaintiff neglects to bring issue to trial according to the course of the court, the court, on motion on notice, shall give judgment as in case of nonsuit, unless they allow farther time, and defendant to have costs as in nonsuit.

Where the record has been taken down to trial, entered, and then withdrawn by the plaintiff; the defendant may have judgment as in case of a nonsuit. 1 East, 346.

If defendant has obtained a rule for costs for not proceeding to trial, he cannot afterwards move for judgment as in case of nonsuit. Barnes, 131. 314. 316.

After costs for not proceeding to trial, judgment as in case of a nonsuit cannot be had for the same default. 4 Taunt. 591.

A defendant having moved for costs for not proceeding to trial according to notice, may afterwards, and in the same term, move for judgment as in case of a nonsuit in the court of exchequer. But the court, on a satisfactory affidavit, will discharge the latter rule, on the terms of the plaintiff giving a peremptory undertaking and paying the costs. 2 Price, 90.

Judgment as for nonsuit should be applied for the first term after plaintiff has not proceeded to trial. Barnes, 314.

Held, that the defendant in a town cause is entitled to judgment as in case of a nonsuit, the next term after that in which issue is joined, if there is time enough to give notice of trial, though it is not actually given, for the sittings in or after the preceding term. 1 H. B. 65. Id. 123.

On an issue of the preceding term, although no notice of trial is given, the defendant may enter up judgment as in case of a nonsuit for not proceeding to trial. 2 Anst. 500.

A motion for judgment as in case of a nonsuit, cannot be made before the third term after that in which issue is joined. 2 H. B. 558.

[\*] Judgment as in case of a nonsuit, may be moved for in the same term in which the plaintiff has been ruled to enter issue. 1 B. & P. 387.

Motion for judgment as in case of nonsuit, may be made the term next after that in which the issue was joined, where notice of trial for the sittings in that term was given. 2 N. R. 397.

The court will not entertain a motion for judgment as in case of a nonsuit, pending a demurrer. 2 Mars. 364.

A second notice of motion for judgment as in case of a nonsuit, must be given after default and peremptory undertaking to try. 1 H. B. 523.

Judgment as in nonsuit may be moved for without term's notice, though no proceedings in a year. Barnes, 308.

Costs for not proceeding to trial, and judgment as in case of a nonsuit, may both be moved for separately, and in that order, but not otherwise. 1 Price, 61.

If a rule nisi, for judgment as in case of a nonsuit, be discharged on the plaintiff's affidavit of facts, the court will not afterwards open it to let in an affidavit denying those facts. Had it been suggested on the rule coming on, that the facts were false, the court would have suspended their judgment until the matter had been examined. 3 T. R. 405.

If plaintiff was ready, but the cause did not come on because the view was not returned by six jurors, judgment shall not be signed. Barnes, 498.

Sickness of plaintiff; marriage of *feme* plaintiff; that the bankrupt did not attend assignees, plaintiffs; that material witnesses were ill; or if record offered to be entered, though a little out of time, sufficient to prevent judgment as of nonsuit. Barnes, 313, 314, 315, 316. 464.

A rule for judgment as in case of a nonsuit, will be discharged on assigning a sufficient ground for not proceeding to trial; and it is a sufficient ground even in penal actions, that the plaintiff delayed, in order that a material witness might be enabled to give testimony, which, without such delay, he could not do without being exposed to penalties. 7 T. R. 178.

As well in *qui tam* actions as in others, any excuse for not proceeding to trial, will discharge a rule for judgment as in case of nonsuit. 1 East, 554.

The insolvency of the defendant happening after the action brought, is good cause against judgment as in case of a nonsuit. Dougl. 671.

The absence of a material witness is a sufficient excuse for not proceeding to trial, so as to discharge a rule for judgment as in case of nonsuit; nor will a peremptory undertaking to proceed to trial be required where it appears that his return is uncertain. 1 Taunt. 118.

In resisting a rule for judgment as in case of a nonsuit upon the absence of documentary evidence at the trial, it is not necessary to state what the documents are. 6 Taunt. 150.

On motion for judgment as in case of nonsuit, rule for plaintiff to enter issue; if he does not, defendant may have *non pros.*; if he enters it, the roll must be produced, and defendant may move for nonsuit; if court admits cause, why nonsuit should not, &c. they appoint day for trial; on such motion, there must be affidavit that the cause is not tried. Barnes, 313, 316.

Replevins and actions *qui tam* are within the statute. Barnes, 315. 317.

There may be judgment as in case of a nonsuit, on a traverse to the return of a *mandamus*. 4 T. R. 639.

Judgment as in case of a nonsuit may be had in a real action. 1 B. & P. 103.

Plaintiff at law having peremptorily undertaken to try the cause, on an order to elect, elected to proceed in equity; on his not going to trial, the defendant may sign judgment as in case of a nonsuit. 2 Anst. 568.



If defendant has obtained a rule for judgment nisi, the court will not give [\*]plaintiff leave to amend his declaration by striking out allegation, but judgment shall be absolute. Barnes, 318.

Nonsuit shall not be set aside, because plaintiff thought defendant was mistaken. Barnes, 295.

In C. B. the payment of costs for not proceeding to trial will be made a term of discharging a rule for judgment as in case of a nonsuit. 2 H. B. 280. 1 B. & P. 38. Wightw. 65.

The first motion for judgment as in case of a nonsuit, will be discharged merely on a peremptory undertaking to try. 2 H. Bl. 119.

The court will order a plaintiff shewing cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial according to notice, to pay the defendant costs, give a peremptory undertaking, and (if the venue has been changed to a county where no assizes are held in the spring) consent that the venue shall be brought back to the original county, that the trial may be brought on without further delay. 2 Price, 16.

The costs of a rule for judgment as in case of a nonsuit, are to be paid by the plaintiff. Forrest. 3.

If in action against two on a joint promise, there is judgment against one by default; and on plaintiff's neglecting to bring issue joined by the other on to trial, rule is obtained for judgment as in case of a nonsuit, yet costs cannot be taxed; for plaintiff could not have been nonsuited on a trial. Weller v. Goyton, T. 30 & 31 G. 2. 1 B. M. 358.

If in an action upon a contract against two, one pleads *non assumpsit* and bankruptcy, and the plaintiff thereupon enters a *nolle prosequi* "as to the several matters pleaded by him," he may proceed against the other. The argument *e contra* was that the *nolle prosequi* confessed that the bankrupt "*non assumpsit*." 2 M. & S. 444.

If the defendant demurs, not for a misjoinder, but for a defect in any of the counts, the plaintiff as to these may enter a *nolle prosequi*. 1 B. & P. 157. 2 Mars. 144. 6 Taunt. 444.

On a demurrer for a misjoinder, the plaintiff cannot enter a *nolle prosequi* as to one set of counts. 4 T. R. 360. 1 H. Bl. 108.

< A nonsuit will not be ordered for the insufficiency of the defendant's evidence; but it may be ordered for the insufficiency of the evidence produced by the plaintiff. Rose v. Learned, 14 Mass. Rep. 154.

As to the power of the court to direct a nonsuit against the consent of the plaintiff, vide Girard v. Getting, 2 Binn. 234. Widdifield v. Widdifield, 2 Binn. 248. Hayes v. Grier, 4 Binn. 84. Irving v. Taggart, 1 Serg. & Rawle, 360. Ross v. Gill, 1 Wash. 89. Thevcut & Hinton v. Finch, 1 Wash. 219.

A nonsuit may be compelled where the evidence on the part of the plaintiff will not support the action. Pratt v. Hull, 13 Johns. Rep. 334.

After a point has been reserved, and a verdict for the plaintiff, the court will not direct a nonsuit. Jones v. Hughes, 5 Serg. & Rawle, 299. >

### (X 2.) *Retraxit*, what shall be.

If the demandant or plaintiff acknowledges *quod non vult alterius prosequi*, this is a *retraxit*. Co. Lit. 139. a. R. 2 Cro. 211. 3 Leo. 177.

So, at any day when he appears in court, (for then he continues present there till a day is given over and may be demanded,) if, on demand, he makes default, this is a *retraxit* in contempt of the court. Co. Lit. 139. a.

So, in trespass or other personal action, a *nolle prosequi* against one defendant will be a discharge to both. R. Cro. El. 762. Semb. cont. Ld. R. 598.

If a defendant or tenant, being present in court, be demanded and makes default, this is a departure in contempt of the court. Co. Lit. 139. a.

But a *retraxit* cannot be after plaint before declaration. R. Dal. 78.

Nor, by attorney, for he must be in person. Per two J. 2 Cro. 211. 8 Co. 58. b. D. Ld. R. 598.

A *retraxit* after judgment shall, unless the contrary appear on the record, be presumed to have been entered by the plaintiff in person. R. Conn v. Lowther, Ld. R. 597.

If there are several defendants, and all found guilty, plaintiff may enter [\*] *nolle prosequi* against any one; therefore, if in *trover* against a defendant executor, and other defendants, not executors, there is a verdict against these, and the executor is found not guilty, judgment shall not be arrested, for plaintiff may enter *nolle prosequi* as to him. Dale v. Eyre, T. 24 & 25 G. 2. 1 Wils. 806.

The court will not allow a defendant to strike out the entry of a judgment of *nolle prosequi* entered by the plaintiff, as to one of the counts of his declaration after it has been demurred to. Milliken v. Fox, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 157.

Nor, will the court in that stage of the proceedings determine a question of costs respecting such a count. Ibid.

(X 8.) Who may be nonsuited :—[and when a nonsuit or non pros. may be entered.]

The king cannot be nonsuited; for he is always in court. Co. Lit. 139. b. Sav. 56.

But a common informer may be nonsuited. Co. Lit. 139. b.

And the attorney-general may enter a *nolle prosequi*, which has the effect of a nonsuit. Co. Lit. 139. b. Hard. 504.

And this after issue joined. Hard. 504.

Or, the jury charged upon the trial. Dub. 3 Mod. 117.

The plaintiff may be nonsuited at any day, when he is demandable. Co. Lit. 138. b.

After interlocutory judgment. Sal. 455.

If one issue is found for the plaintiff, he may be nonsuited as to other issues or a demurrer. Sal. 456.

If several defendants plead severally, he may enter a *non pros.* against one before the record is sent down to trial. Sal. 457. Doug. 169. n.

In an action against several defendants, though they plead jointly, yet, if their plea is in its nature several, the plaintiff may enter a *nolle prosequi* as to one, and proceed against the rest. R. Gree v. Roll, Ld. R. 716. And this at *nisi prius*. R. Ld. R. 716.

But, in such a case, one defendant cannot sign judgment of *non pros.* as to himself, and take out execution; or if he do, the court will set it aside on motion within the same term: but in a subsequent term the application is too late, and the redress must be by writ of error. Doug. 169. n.

Yet, wherever it can appear that the action is not a joint action, judgment of *non pros.* may be signed by all or any of the defendants named in the writ. 2 T. R. 257.

So, on the return of a *withernam*, the plaintiff may be nonsuited; for though the *replevin* and *alias* have not any day given to the party, (for they are *vicintiel*,) yet the *pluries* has, and the day of return is the day for both parties. Sal. 583.

But he cannot be nonsuited against one defendant, after final judgment against all. Sal. 455.

In a joint action he cannot be nonprosessed by one or some of the defendants without the others. Doug. 169.

Therefore, where the plaintiff had sued out a bailable writ against three, on which

one was arrested, and put in bail, and for want of a declaration within two terms, signed judgment of *non pros.* the other two defendants not having appeared to the writ, this *non pros.* was set aside. *Ibid.*

The rule is, that if plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *non pros.*; but if no [\*] advantage is taken of the plaintiff's neglect, the plaintiff may still deliver his declaration within the year. *Worley v. Lee*, B. R. M. 28 Geo. 3. 2 T. R. 112. *Sherson v. Hughes*, B. R. M. 33 Geo. 3. 5 T. R. 36.

The statute, 13 Car. 2. st. 2. c. 2. enabling a defendant to sign judgment of *non pros.* for want of a declaration in due time, extends to all cases. *Oldham v. Burrel*, B. R. M. 37 Geo. 3. 7 T. R. 26. *Vide supra*, (C 3.)

In a *qui tam* action, judgment as in case of a nonsuit may be entered on a rule to shew cause. *Watson v. Johnson*, P. 25 G. 2. 1 Wils. 325.

< After an award to answer, or a demurrer in law joined, the plaintiff may be nonsuited for non-appearance. *Swift v. Livingston*, 2 Johns. Cas. 112. >

#### (X 4.) When a nonsuit is peremptory.

After nonsuit the plaintiff may begin the same suit again. *Co. Lit.* 139. a. 'Though it be in assize. 1 Sal. 82.

But not after a *retraxit*. *Co. Litt.* 139. a.

So, in an appeal of murder, robbery, &c. a nonsuit after appearance shall be peremptory *in favor. vitæ*. *Ibid.*

So, in an appeal of mayhem; for the writ says, *felonice maihemavit*. *Ibid.*

So, in *nativo habendo*, in favour of liberty. *Ibid.*

So, in *quare impedit*, for thereon the defendant has a writ to the bishop. *Co. Lit.* 139. a. Cont. per Dy. within six months. Dal. 81. Acc. 1 Browl. 161. R. Sal. 559.

So, in attain. *Co. Lit.* 139. a.

Otherwise, a nonsuit before appearance. *Co. Lit.* 139. a. 1 Sal. 64. Carth. 173.

As, if the plaintiff in an appeal declares by attorney, and is demanded, and does not come into court. 1 Sal. 64.

If after nonsuit on the merits, and motion for new trial denied, plaintiff brings new action in another court, it will stay proceedings till costs of the nonsuit paid, for this is vexatious. *Melchart v. Halsey*, H. 11 G. 3. 3 Wils. 149.

After a nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit be paid; notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Weston v. Withers*, B. R. E. 28 Geo. 3. 2 T. R. 511.

#### (X 5.) When a nonsuit of one of the plaintiffs shall be a nonsuit of the other.

So, generally, in personal actions the nonsuit of one plaintiff is the nonsuit of both. *Co. Lit.* 139. a.

So, in *nativo habendo* and *quid juris clamat*. *Ibid.*

But in real or mixt actions against several, if the demandant is nonsuited as to one, he shall not be nonsuited as to all; for there ought to be a summons and severance. *Ibid.*

Not in an *audita querela*; for it goes in discharge. *Ibid.*

Nor, in error, attain, or *scire facias* on real or mixt actions; for they follow the nature of the actions on which they are founded. *Ibid.*

So, a *nolle prosequi* before judgment against one shall be a discharge to all. R. Hob. 70.

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[\*] So, after judgment against all, if the plaintiff enters a *nolle prosequi* to one, it shall be a discharge to all. Hob. 70.

So, in trespass against several, if the plaintiff is nonsuited before declaration, there shall be only one nonsuit as against all the defendants; for though he may declare severally, it shall not be presumed till he does so. R. Sal. 455. [Com. 74. S. C. Pryce v. Foulkes, B. R. E. 9 Geo. 3. 4 Burr. 2418.]

So, in trespass against several, if one pleads not guilty, and there is a verdict and judgment against him, and the other defendants justify, the plaintiff may enter a *nolle prosequi* against those who justified, and not discharge him who pleaded not guilty; for by the judgment the suit was ended as to him. R. Hob. 70.

{ In a personal action, where several sue jointly, and they suffer a nonsuit, one, who had no knowledge of the suit, and had no interest in it, is not liable to his co-plaintiffs for any part of the costs recovered by the defendant. Wilson v. Mower, 5 Mass. Rep. 407. }

### (Y) JUDGMENT.

#### (Y 1.) When it shall be upon default.

In real actions, upon default before appearance, a *grand cape* issues, and if the tenant does not appear thereon, there shall be judgment against him. Mod. Ca. 4. Vide ante, (B 11.)

On default after appearance in a writ of right, there shall be final judgment.

So, in other real actions, upon default after a verdict for the demandant. Or, on a departure in despite of the court.

But, generally, in other real actions, a *petit cape* issues before judgment.

In personal actions, where an outlawry lies, process issues against the defendant till he appears, or is outlawed.

If judgment be by default, the entry shall be *ideo consid. quod recuperet by default*.

Or, if the default is entered, and afterwards *ideo cons. quod recuperet*, without saying by default, it is sufficient. R. 2 Cro. 36.

In personal actions, after appearance, if the defendant does not plead, judgment shall be entered up against him on *nihil dicit*. Vide ante, (E 42.)

Or, the attorney, to save him from damages in a writ of deceit, may say *quod non est informatus per magistrum suum* of an answer, and thereupon there shall be judgment against the defendant. F. N. B. 98. J.

It is a rule, that where by a writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this, even though the writ be not returned; when, if the plaintiff do not appear, the defendant is entitled to judgment. 1 T. R. 371.

If a party neglect to plead, reply, &c. within the time limited by the rule, the other may sign judgment, though a plea, replication, &c. be tendered before judgment signed. 4 T. R. 195.

A plaintiff entitled to judgment for want of a rejoinder, may strike out the pleadings subsequent to the declaration, and sign judgment as for want of a plea. 5 T. R. 152.

[\*] In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury, whether the tres-

pass proved be the same as that confessed; but the plaintiff cannot be nonsuited. Cowp. 483. 3 E. N. P. C. 202. 3 Camp. 36. 1 M. & S. 588.

< Where the defendant gives notice of a motion to change the venue, &c. without an order to enlarge the time of pleading, the plaintiff may, when the time of pleading is out, enter a default. Ekhart v. Dearman, 2 Caines' Rep. 379.

In what cases the laches of the defendant as to notices of special bail, retainer of an attorney, &c. will authorize the plaintiff to enter judgment. Leispenard v. Baker, 6 Johns. Rep. 323.

A default cannot be entered before the appearance of the defendant. Howell v. Dermiston, 3 Caines' Rep. 96.

The party is to be governed by the pleadings delivered to him; he cannot, therefore, enter a default, because no original is filed, when a copy has been delivered to him. Smith v. Wells, 6 Johns. Rep. 286.

A default cannot be entered, for want of a plea, until the day after the time for pleading has expired. Thomas v. Douglass, 2 Johns. Cas. 226.

Nor can it be entered, unless the affidavit of service of a copy of the declaration, and notice of the order to plead, be positive and sufficient, at the time the judgment is entered. Doolittle's Exrs. v. Ward's Exrs. 5 Johns. Rep. 359. >

### (Y 2.) When upon confession.

So, a defendant may confess the action.

But after issue and *venire facias*, the defendant cannot by a *relicta verificatione* confess the action without the plaintiff's consent. R. 1 Brownl. 196.

So, if the defendant, being executor of his own wrong, pleads that he has 10*l.* (which is more than the debt demanded), which he retains to satisfy a debt to himself, and has no assets *ultra*, there shall be judgment for the plaintiff on the defendant's confession; for an executor of his own wrong cannot retain for his own debt, and then he confesses assets to the value of the debt. R. Yel. 138. Vide ante, (E 42.)

So, in all cases, where the defendant by his plea confesses the cause of action, and offers a bad justification. Mod. Ca. 10.

If the defendant plead a justification, which is ill in substance, though the parties plead to issue thereon, and a verdict is found for the plaintiff, he shall not have judgment upon the verdict, but upon the confession; and a writ of inquiry shall be awarded to ascertain the damages, if the damages in the action are arbitrary. R. Ld. R. 90. Thus, where a defendant justified a trespass under a writ, which appeared upon the pleadings to be void, though the parties pleaded to issue thereon, and the plaintiff had a verdict, the court set aside the verdict, ordered the judgment to be entered on the defendant's confession, and awarded a writ to inquire into the damages. Ld. Ray. 90. P. C.

If the defendant gives a warrant of attorney to confess the action, the judgment will be good, though the defendant dies the same day before judgment signed. R. Ray. 18.

So, if the defendant dies in the vacation, and judgment is entered as of the prior term, before the essoin day of the next term. 1 Sal. 87.

And, if the warrant be general, it may be confessed in any term. 1 Mod. 1.

So, the warrant will be good, though the attorney be afterwards made a knight. Per Brown, Ow. 31.

If the warrant be by a woman, who afterwards takes husband, the bill may be filed, and judgment entered against both. Sho. 91, cont. 1 Sal. 117. 399.

So, if the warrant is to acknowledge judgment to a woman who marries, it is no countermand. R. 1 Sal. 117.



If warrant of attorney is given to confess judgment to a *feme-sole*, who afterwards marries, and judgment is entered up by husband and wife, it is irregular, and must be set aside, if it is so entered up without leave of the court. *Marder v. Lee*, P. 4 G. 3. 3 B. M. 1469.

If the warrant is by a woman, a *sole*, it shall not be avoided for that she is *covert*, without a writ of error. 1 Sal. 400.

If the warrant is given on an arrest, and the defendant countermands it, before judgment confessed, yet the court will protect the [\*]attorney, if he pleads *non sum informatus*, whereby judgment may be entered up against the defendant. *Latch*, 8.

So, if after warrant given the plaintiff tears off the seal, an attachment lies. 1 Vent. 3.

If warrant be to acknowledge judgment on an agreement to stay the execution for a year, it must be in writing. *Mod. Ca.* 14.

And if the plaintiff uses the judgment contrary to his agreement, the court will avoid the judgment. 1 Sal. 400.

So, if the agreement is to stay execution, and he brings debt, it will be a breach. *Sal.* 596.

Otherwise, if the agreement was subsequent to the judgment given. 1 Sal. 400.

But the warrant must be strictly pursued; and therefore, if it is to confess judgment in Trinity term, without more, it cannot be done in any other term. 1 *Mod.* 1.

So, generally, the defendant's death is a countermand of the authority. *D.* 1 Vent. 310. 1 Sal. 87.

If defendant dies in term time, judgment may be entered after his death, that same term. *Str.* 882.

Court refused to set aside judgment, signed after death of defendant, because a judgment of the precedent term, when defendant was alive. *Willes*, 427.

Judgment cannot be entered on a warrant of attorney, after plaintiff's death. *Str.* 718. 8 T. R. 257.

If judgment on warrant of attorney is entered after defendant's death, the court will not set it aside, though they would not make a rule for it. *Barnes*, 270.

Judgment on a warrant of attorney entered in Easter vacation against a defendant who died in Easter term, is good; but execution cannot be taken out until it be revived against defendant's representative by *seire facias*. 6 T. R. 368.

If a rule is made to enter up judgment on an old warrant of attorney, on affidavit that the party is alive, and it afterwards appears that he died some hours before, the court will not discharge it. *Str.* 1081. *Andr.* 53.

If there is warrant of attorney to confess judgment to two, and one dies before judgment entered, and it appears that it was given to indemnify them against a bond entered into by them in behalf of defendant, the court will give leave to the survivor to enter up judgment. *Todd v. Dod*, M. 25 G. 2. 1 *Wils.* 312. *Vide Barnes*, 45. 51, 52, 53.

Warrant from two, one dies, leave to enter against the survivor. *Barnes*, 53.

Satisfaction may be entered *nunc pro tunc* on a warrant, plaintiff being dead, and his administrator a lunatic. *Barnes*, 258.

If judgment at the suit of an executor is entered up, as of a term in testator's life-time, it shall be set aside. *Gainsborough v. Follyard*, M. 13 G. 2. *Str.* 1121.

On warrant to enter, at the suit of A., his heirs, executors, &c. executor shall have leave to enter. *Barnes*, 44.

If judgment is neglected to be entered on the roll, and the roll is lost, the court will order the clerk of the judgments to sign a new roll. *Douglas v. Yellop*, H. 32 G. 2. 2 B. M. 722.

The clerk of the judgments, having received his fees, is liable to an action by a purchaser become liable to a judgment which he did not find entered up ; the attorney is liable to the clerk of the judgments. Ibid.

On warrant from one to ten years old, leave may be given by treasury-rule ; [\*]above ten, motion in court ; above twenty, rule to shew cause. Barnes, 41. 47.

Judgment may be entered on an old warrant, on affidavit of execution, &c. and that defendant was alive in Ireland two months before. Barnes, 53.

Or, in Jamaica four months before. Barnes, 256.

Leave may be granted if plaintiff is lunatic, on affidavit of the person who has received the interest. Barnes, 42.

The court will not give leave to enter judgment on an old warrant, on an affidavit sworn in Ireland before an Irish commissioner. *Sibthorp v. Adams*, C. B. T. 10 G. 2. Barnes, 40.

So, if a man under arrest confesses judgment, it will be irregular, if an attorney of B. R. or C. B. is not present. Mod. Ca. 85. 1 Sal. 402.

The presence of attorney of C. B. at executing (in custody) warrant to enter up judgment in B. R., is sufficient. *Bland v. Pakenham*, M. 9 G. Str. 580. Barnes, 44.

But he must be attorney for defendant. General Rule. P. 4. G. 2. Str. 902.

No excuse can be allowed against this rule. B. R. H. 177.

Nor, though the warrant is executed in a foreign country. Str. 1247.

But defendant in execution, paying part of the debt, may give warrant of attorney to confess new judgment for the rest, though no attorney is present, both the standing rules of court of Car. 2. and 4 G. 2. intending only to arrests on mesne process. Str. 1245. Vide Cowp. 281. 7 T. R. 19. 1 T. R. 715.

And in the case of a warrant of attorney given by a person in execution, if he has been prevailed on to acknowledge it for more than was due, the court will give relief under circumstances. Cowp. 281.

But this rule extends only to the particular cause whereupon defendant is in custody, and not to giving warrants of attorney to confess judgments in other actions. 1 East, 141. 3 B. M. 1792. 2 Ld. Raym. 797.

If defendant practises as an attorney, no other need be present ; but plaintiff an attorney is not sufficient. Barnes, 37.

Attorney's clerk is not sufficient. Barnes, 42.

But the court will not set aside a warrant of attorney on account of its being given by a defendant in custody without an attorney present on his part, if it was executed by the defendant purposely with a view to cheat the plaintiff. Cowp. 141.

Interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200*l.*, with a defeazance on paying 40*l.* (the real debt) and costs ; but no attorney was present on the part of the defendant : though this case was not strictly within the rule 15 Car. 2. which mentions only prisoners in the custody of sheriff's officers, yet the court interfered for the relief of a prisoner. 3 T. R. 616.

But at the plaintiff's request they permitted him to alter his judgment to the real debt, on paying the costs. Ibid.

A warrant of attorney to confess judgment executed by a prisoner in custody on criminal process, is good, though he have no attorney present. 4 T. R. 433.

When a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part ; the presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting also as his attorney. 7 T. R. 7.

If a defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence [\*]he executes the warrant : the court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney. 1 Bos. & Pull. Rep. 97.

If he is arrested by process of an inferior court, and confesses judgment in a court at Westminster. Mod. Ca. 85. 1 Sal. 402.

[\*231] [\*232]

So, if he is discharged only in appearance, or apprehends himself not discharged. Mod. Ca. 85.

So, if confession of judgment is obtained by practice, though an attorney is present. Ibid.

If the warrant has been obtained by fraud, the court will order it to be delivered up, before any use has been made of it. Doug. 198.

But this does not extend to a warrant of attorney to give judgment as a security to A. and not to the plaintiff. 5 Mod. 144.

But B. R. do not examine warrants for judgment in C. B. or *e contra*. 1 Sal. 402.

If defendant under arrest on a *latitat*, gives warrant of attorney to confess judgment in C. B., no attorney but plaintiff's being present, B. R. cannot set aside the judgment, but will grant attachment against plaintiff and his attorney, till satisfaction is entered, or judgment set aside, with costs.

So, a judgment, though regular, shall be quashed on payment of costs, when a trial has not been lost. 1 Sal. 402.

And regularity shall not be examined into, after error brought. Ibid.

On motion to set aside judgment, the warrant being obtained on usurious contract, (which is not pleadable to *sci. fa.*) court will direct issue to try facts. Barnes, 277.

The court set aside a warrant of attorney, and judgment given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up, which had been given to procure the defendant's release out of execution on the judgment. 1 Bos. & Pull. 270.

If plaintiff enter up judgment in debt on a *mutualus*, on a warrant of attorney "to enter up judgment in debt on bond," the court will set it aside as irregular. 8 T. R. 153.

If defendant pleads not guilty, and also by his plea confesses the trespass, and justifies under a custom, upon which a verdict is found for him, yet if the custom is void in law, the court shall give judgment for plaintiff, award writ of inquiry of damages, and give final judgment for damages and costs, *nullo respectu habito veredicto*. As to not guilty, defendant *eat sine die*. On error from C. B. judgment affirmed unanimously in B. R. Wils. 63. Barnes, 267.

It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it, notwithstanding the rule 14 & 15 Geo. 2 to the contrary. 2 H. Bl. 383.

Though a judgment has been irregularly signed without filing common bail for the defendant, according to the statute, till after the succeeding term after the writ was returnable, and after the judgment itself had been entered up, yet the defendant, having given a *cognovit*, is estopped from objecting to the irregularity, if before the time of making such objection the plaintiff has filed common bail *nunc pro tunc*. 7 T. R. 206.

Judgment entered up on a warrant of attorney against defendant in Jamaica, on an affidavit that he was alive four months ago. Willes, 66. Sir G. Co. 145. Barnes, 256.

If A. agree to acknowledge an old warrant of attorney given by him "so as to enable B. to enter up judgment thereon," judgment may be entered up [\*] under a judge's order, without an affidavit of the subscribing witness. 2 Bos. & Pull. 85.

All warrants of attorney to confess judgment, must be delivered to, and filed by the clerk of the dockets. Reg. Gen. B. R. M. 42 Geo. 3. 2 East, 136. C. P. M. 43 Geo. 3. 3 Bos. & Pull. 310.

And if any such warrant be subject to any defeazance, such defeazance must be written on the same paper with the warrant, or at least a memorandum containing the substance and effect of the defeazance. Ibid.

The court refused to set aside, on a summary application, a judgment entered on a warrant of attorney given by a *feme covert*. 3 Bos. & Pull. 128.

{ Where an attorney appears specially for one of two defendants, and afterwards confesses judgment for the "defendant," a joint execution against both, is erroneous. *Kimmel v. Kimmel*, 5 Serg. and Rawle, 294. Vide *Ward v. Johnston*, 1 Munf. 45.

A judgment may be entered on a *cognovit actionem*. *Arden v. Rice*, 1 Cames' Rep. 498.

A confession must be for a specifick sum : A confession for such sum as A. and B. may award, is bad. *Nichols v. Hewitt*, 4 Johns. Rep. 423. Vide *Lewis v. Smith*, 2 Serg. & Rawle, 155. *Dunbar v. Lindenberger*, 3 Munf. 169.

But it seems, that a judgment on a bond and warrant of attorney, may by consent, be entered for the sum then due, and also for future advances ; provided, the whole amount does not exceed the condition of the bond. *Livingston v. M'Inlay*, 16 Johns. Rep. 165.

After a lapse of 18 years, the court refused to permit a judgment to be entered up on a bond and warrant of attorney, on the usual affidavit, the legal presumption being that the bond had been paid. *Clark's Exrs. v. Hopkins*, 7 Johns. Rep. 556.

The effect of a judgment by confession. *M'Farland v. Irwin*, 8 Johns. Rep. 61. 2d edit. *Sebring v. Rathbun*, 1 Johns. Cas. 331.

If an executor confess a judgment on a fictitious debt, for a fraudulent purpose, he is without remedy. *Clay v. Williams*, 2 Munf. 105. }

### (Y 3.) When upon the declaration, plea, &c.

When there shall be judgment, on the declaration, plea, or replication, vide ante, (M 1, 2, 3.)

When error in a judgment shall be amended, vide Amendment, (R.)

When a motion shall be allowed in arrest of judgment, vide ante, (S 48.)

If judgment is irregularly signed or obtained, the court will set it aside.

But not because the attorney appeared without warrant. *Mod. Ca.* 16.

The court will set aside a judgment, on putting the plaintiff in as good a condition. *Str.* 823. (The leading case in B. R.)

The court will not restrain a defendant from pleading the statute of limitations, on setting aside a regular interlocutory judgment. 1 Bos. & Pull. Rep. 228.

If defendant is not served with process, but is served with declaration, and judgment is signed, it shall not be set aside ; for defendant should have come in and taken advantage of it. *B. R. H.* 240.

After error brought, the court will not set aside judgment for irregularity ; for it admits a judgment, and is a waiver of the irregularity. *Andr.* 296.

So, is taking out a rule to be present at taxation of costs. *Semb. ibid.*

Judgment shall not be set aside for a small mistake ; (as, if declaration is entitled of the 19th of G. 2. instead of the 18th and 19th.) *Wils.* 104.

If defendant pleads sham plea, and plaintiff obtains the common rule that defendant shall plead the morrow, and such plea shall not be waived, and defendant takes no notice of it, and plaintiff signs judgment, it is irregular, and shall be set aside ; for the first plea stands. *Str.* 1234.

In *assumpsit*, if defendant pleads general issue, and statute of limitations ; and issue found against him, and on the special plea, replication, rejoinder, surrejoinder, demurrer thereto by defendant, in which plaintiff joins, he need not give notice of making it a *concilium*, or putting it in the paper, and judgment shall not be set aside for want of it ; not on payment of costs, and offer to waive error. *Str.* 1242.

The court will not set aside the proceedings in ejectment for irregularity, because the notice at the foot of the declaration is subscribed in the name of the nominal plaintiff, instead of that of the casual ejector. 3 T. R. 351.

If defendant pleads *non assumpsit*, and statute of limitations, and delivers it to

plaintiff, who makes up issue, and delivers it with notice of trial to defendant, who pays for it, and then plaintiff pays clerk of the papers his fees, makes up record, and goes to trial; the court will not set it aside, though defendant makes no defence, for he was in the first fault, in not leaving the pleas in the office. Str. 1266.

§ If matter be contained in a plea in bar, which ought to be pleaded in abatement, without being verified by affidavit, the plaintiff may treat it as a nullity, and enter a default for want of a plea. Robison v. Fisher, 3 Caines' Rep. 99.

Whether a default, regularly obtained, may be set aside on an affidavit of merits? vide Davenport v. Ferris, 6 Johns. Rep. 131. M'Kinstry v. Edwards, 2 Johns. Cas. 113. S. C. Coleman, 124. Spencer v. Webb, 1 Caines' Rep. 118. Cogswell v. Vanderbergh, 1 Caines' Rep. 156. Beekman v. Franker, 3 Caines' Rep. 95. Russell v. Ball, 3 Johns. Cas. 91. Corporation of New-York v. Sands, 2 Caines' Rep. 378. Thompson v. Payne, 3 Caines' Rep. 88. Bennet v. Fuller, 4 Johns. Rep. 486. Fenton v. Garlick, 6 Johns. Rep. 287. Briggs v. Briggs, 8 Johns. Rep. 257, 444. Jackson v. Stiles, 3 Caines' Rep. 93. Wilkes v. Hotchkiss, 5 Johns. Rep. 360. Tallmadge v. Stockholm, 14 Johns. Rep. 342. Dutilh v. Miller, 2 Browne, 311.

A default may be set aside, on affidavit that the plea was sent by mail, and the receipt of it is not denied by the counter affidavit of the plaintiff's attorney. Stafford v. Cole, 1 Johns. Cas. 413. Hudson v. Henry, 1 Caines' Rep. 67. Ludlow v. Heycraft, 2 Caines' Rep. 386.

And certain cases, where the defendant's attorney is uninformed of the state of proceedings, and where the clerk neglects to enter the appearance of the defendant, a default may be set aside. Tennent v. Steele, 1 Caines' Rep. 68. Ross v. Hubble, 1 Caines' Rep. 512.

Misapprehension of stipulations, and mistake, accident admitted as grounds for setting aside a default. Olney v. Bacon, 3 Caines' Rep. 132. Wilson v. Guthrie, 3 Caines' Rep. 134. Gardinier v. Crocker, 3 Caines' Rep. 139. Bennet v. Fuller, 4 Johns. Rep. 486. Cohan v. Kip, Coleman, 45.

Executors and administrators are to be favoured, when judgment is rendered against them, by the fault or negligence of their attorneys. Phillips v. Hawley, 6 Johns. Rep. 129.

A judgment by confession will be set aside, if it appear, that the bond was given without consideration, or for an illegal consideration. Everitt v. Knapp, 6 Johns. Rep. 331.

Whether the court will set aside a judgment on confession? Vide Lebring v. Rathbun, 1 Johns. Cas. 331. Manhattan Co. v. Brower, 1 Caines' Rep. 511. King v. Shaw, 3 Johns. Rep. 142. Richmond v. Roberts, 7 Johns. Rep. 319. †

## [\*](Z) WRIT OF INQUIRY.

### (Z 1.) When necessary.

If there be judgment by default or confession, and the certainty of the demand appears upon record, the court may assess damages without awarding a writ of inquiry, if they will. 2 Sand. 107.

But this must be done with the consent of the plaintiff. 7 T. R. 446.

After judgment by default in an action of debt on a judgment, the plaintiff may sue out a writ of inquiry. Ibid.

So, if there be judgment for the plaintiff on demurrer.

Demurrer to one count (on a bill of exchange,) and judgment for the plaintiff, plea to the other counts on which issue was joined; and it was referred to the master to see what was due to the plaintiff on the former, though he had not entered a *nolle prosequi* as to the latter. 7 T. R. 473.

Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry on the demurrer. 1 Str. 532.



As is the usual course in debt. 1 Rol. 579. l. 5. R. 2 Sand. 107. Though it be debt upon a judgment. 1 Sid. 442.

A writ of inquiry is never permitted in debt. 14 East, 442. { Vide Fenton v. Garlick, 6 Johns. Rep. 287. Craig v. Alston, 1 Rep. Con. Ct. 123. }

The court will not refer it to the master to take an account of what is actually due on bond, for principal and interest and costs, after a verdict for the plaintiff on the bond having been put in suit. 3 Price, 219.

After judgment on demurrer, or by default in covenant, on a covenant of counter-indemnity to a specified amount, and which it is averred the plaintiff had paid, the court will not refer it to the master to compute what is due. 14 East, 622.

So, it may be in trespass, where the trespass is not denied: as, upon a judgment by *nil dicit, non sum informatus, &c.* Yel. 152. 1 Rol. 573. l. 10.

So, upon a *recordari*, for cattle taken, &c. 1 Rol. 571. l. 40.

So, for a defendant in replevin, who avows for rent. R. 3 Leo. 213. { Vide Solomon v. Harvey, 1 Nott & M'Cord, 81. }

If a defendant suffers judgment by default in an action on a bill of exchange, the court of B. R. will refer it to the master, to see what is due on principal and interest, without executing a writ of inquiry. 4 T. R. 275. 1 H. Bl. 252. 529. 541.

The court will refer a bill of exchange to the prothonotary to compute principal, interest, exchange, re-exchange, and costs; but not charges and expenses. 2 Bos. & Pull. 55. The court will not refer it to the master (after judgment by default,) to see what is due for principal and interest, on an affidavit stating that the action is brought to recover the amount of a promissory note, unless it appear on the declaration that such is the cause of action. 8 T. R. 648.

A bond dated on a day certain, in a penal sum, conditioned for payment of a less sum generally, without naming any day of payment, is payable on the day of the date: and in any action brought upon it, the court of B. R. will refer it to the master to compute principal, interest, and costs thereon, and on payment of the same, stay the proceedings. 7 T. R. 124.

So, in an action of covenant on a mortgage deed. 8 T. R. 326.

So, in an action on a bail bond. 2 Bos. & Pull. 446.

So, in actions of covenant for the payment of a sum certain. 2 Saund. 106. Dougl. 316. 3 Wils. 61.

On an interlocutory judgment, in debt on a judgment in an action brought on a bill of exchange, the court refused to refer it to the master. 8 T. R. 395.

[\*]Reference to the master, to compute what is due in covenant for non-payment of rent, allowed. 8 T. R. 326. 410.

In covenant for non-payment of rent, and for not repairing, it was referred to the master as to the rent, and on payment process was stayed as to that. 1 Wils. 75.

In an action for rent, the court will refer it to the prothonotary to compute what is due, provided it appear that the action is on a lease under seal. 2 Mars. 57. 6 Taunt. 356.

After judgment by default in *assumpsit* on a foreign judgment, the court will not refer it to the master to see what is due, in lieu of a writ of inquiry. 4 T. R. 493.

Again, in an action on a bill of exchange for 200*l.* Irish money, where judgment had been suffered to go by default, the court discharged a similar rule. 5 T. R. 87.

And though the defendant will not consent to it, it does not signify, if the plaintiff consent. 2 Sand. 107.

Though the defendant is executor, and has no assets. R. 2 Sand. 107. Semb. Skin. 561.

Yet, if the plaintiff does not consent, there may be a writ of inquiry. 2 Sand. 107.

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But where the demand is not certain upon the record, a writ of inquiry must issue; as, in trespass, where the defendant pleads not guilty. *Yel.* 152.

In trespass on the case, replevin, &c. *Pr. Reg.* 558. *R.* 3 *Leo.* 213. *R. Lut.* 213. 211.

So, on judgment affirmed on a writ of error, a writ of inquiry may issue, if it would lie on the first judgment. *Pr. Reg.* 559.

In debt for such goods, or the value, a writ of inquiry shall issue to inquire the value. *R.* 11 *H.* 7. 5. b. *R. Cro. El.* 536.

And even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the plaintiff goes for interest, which the jury assesses in the name of damages, by *Butler J.* *Dougl.* 316.

A writ of inquiry is not necessary, where the action is on a covenant for the payment of a liquidated sum. *Dougl.* 316.

The court refused to refer to the prothonotary, a demand of fees by the warden of the fleet. *1 H. B.* 105.

Yet, where issue is joined, a writ of inquiry never issues; for the jury which tries the issue, must assess the damages, and the omission cannot be supplied by a writ of inquiry; for then, if they should be excessive, the defendant will lose the benefit of his attain. *R.* 10 *Co.* 119. a. *2 Rol.* 722. 1. 10. *R.* 11 *Co.* 6. a. *Heydon*, 56. a. *Bentham*. *Vide Damages*, (E 1, 2.) *2 Bos. & Pul.* 163.

If there are several breaches, some confessed, others denied, and *venire tam, &c. quam, &c.* and the jury omits to inquire of the damages on the breach confessed, writ of inquiry may issue. *Barnes*, 228.

So, where one defendant pleads to issue, and the other makes default, a writ of inquiry is awarded to avoid a discontinuance, but does not issue; for the jury which tries the issue shall assess the damages. *1 Leo.* 141. *R.* 11 *Co.* 6. a. *Heydon*. { *Vide Simpson v. Geddes*, *2 Bay*, 533. }

So, in detinue, if the jury find damages, but not the value of the goods, it cannot be supplied. *Sal.* 206. *cont.* 5 *Mod.* 76. *Skin.* 595. { *Vide Key v. Allen*, *2 Murph.* 523. }

Yet there may be a writ of inquiry, though issue is joined, where the plaintiff is nonsuited. *5 Mod.* 77. 118. *1 Sal.* 205. *Skin.* 595.

In an action against an overseer of the poor, if there is a verdict for him, [\*] and no damages assessed, a writ of inquiry shall issue. *Str.* 1021. And a suggestion shall be entered on the roll for that purpose. *Vide 2 Bl.* 763. 921.

The want of a writ of inquiry is aided by the statute of jeofails. *Str.* 878.

{ The court will settle interest, in debt on judgment, without the intervention of a jury. *Armstrong v. Carson's Exrs.* *2 Dall.* 302.

So, where there is an agreement that judgment shall be entered on a promissory note, "for what may be due," an inquisition is necessary. *Hancock v. Hillegas*, *2 Dall.* 380.

So, in assumpsit, where the debt is not ascertained, and after a judgment for want of affidavit of defence there must be an inquisition. *Coates v. M'Camm*, *2 Browne*, 173.

On a confession of judgment, in an action sounding in damages, the court will assess damages but a writ of inquiry must be executed. *Dunbar v. Lindenberger*, *3 Munf.* 169. }

## (Z 2.) How it shall be sued and executed.

If a writ of inquiry issues, notice of the executing it shall be given to the defendant, if he lives within 40 miles of London or Middlesex, and the inquiry is there, eight days exclusive of the day of notice. *Per Rule*, 1654. *Mills*, 29. *Mod. Ca.* 146.

If the defendant lives above 40 miles from London, 14 days notice shall be given exclusive. Mills, 29. Mod. Ca. 146.

Though defendant is an attorney. Barnes, 264.

A defendant who is master of a vessel belonging to a port above forty miles from London, and who has no regular residence on shore, is entitled to fourteen days notice of executing a writ of inquiry. 2 Mars. 151. 6 Taunt. 458.

And in all writs of inquiry in *pais*, or inquiry in dower or waste, there shall be eight days notice exclusive. Mills, 30.

Though it be 40 miles distance, eight days notice is sufficient. Mod. Ca. 146.

Where a defendant whose general residence is in the country, has resided in London, (at an hotel *e. gr.*) from the time of arrest till service of notice of inquiry he is entitled only to eight days notice. 7 East, 624.

So, notice shall be given in a *scire fieri* inquiry. 2 Mod. Ca. 366.

There must be the same notice of executing a *scire fieri* writ of inquiry, as a common writ of inquiry. Str. 235. 623. Barnes, 304.

Where a term's notice of trial is required, there must, at the same distance of time, be like notice of executing writ of inquiry. Str. 1100.

If no proceedings within 12 months, a term's notice must be given. Barnes, 291. 294. 394.

Notice given in the country is good. Barnes, 305. B. R. E. 27 Geo. 3. 1 T. R. 710. *semb. contra.*

Notice is in future to be given to the agent in town, and not to the attorney in the country. East, 568.

If plaintiff's name is mistaken in notice, inquiry shall be set aside. Barnes, 310.

Notice to execute before judge of assise must be general, not on a day certain. Barnes, 135.

Notice is bad, if the hour is not specified though defendant said he would make no defence; and the time between hour and hour must not be above two. It must express the name of the house, the county, town, and street. Two days at least given to attorney, not to defendant, if appearance. Notice for eleven is good, if executed before twelve. Barnes, 293. 295, 296, 297. 299. 300, 301, 302. 309. 311.

For on notice to execute a writ of inquiry at a certain hour, the party is not tied down to the precise time fixed by the notice, because the sheriff may have more business which carries him beyond the time. Doug. 198.

Notice on Tuesday the 14th of January instant, when the 14th was on a Thursday, the court determined to be good notice, rejecting the word Tuesday as surplusage. 3 Bos. & Pull. 1.

If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. 1 Bos. & Pull. Rep. 363.

If there is notice to execute writ of inquiry by ten o'clock, and no defence made, the court will set it aside for uncertainty. Str. 1142.

[\*]Irregularities in notice, or in appointment of deputy, are cured by defendant's making defence. Barnes, 233. 309. 413.

< Notice of executing a writ of enquiry, may be given at any time after default. Spencer v. Gould, 2 Caines' Rep. 109.

It is the uniform practice in Pennsylvania, to give the defendant eight days personal notice of the execution of a writ of enquiry. Moore v. Hess, 4 Yeates, 261. >

A writ of inquiry, and other inquests of office, may be executed before a greater or less number than twelve. F. N. B. 107. C. R. 2 Rol. 673. l. 53. Cro. Car. 414.

For no attaint lies. Str. 1159.

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So, award of writ of inquiry, to inquire by the oaths of honest men, omitting twelve, is good. B. R. H. 288.

And there shall be no challenge to the array or polls. 2 H. 4. 2. b. Per Holt, Mod. Ca. 43.

Except in a writ of inquiry for waste. Co. Lit. 158. b. Dal. 9.

And the inquiry shall be by any jurors of the county; and therefore default of a *venue* is not material after a writ of inquiry awarded. R. Lut. 237.

If a jury don't appear, the plaintiff may have an *alias* and *pluries*, but cannot have a *habeas corpus*; for it is error. R. Yel. 130.

If the inquest appear, it cannot be continued *per ponit, in respect.*, but only by *vice comes non misit breve*. R. Yel. 97.

It may be adjourned after entered upon, like a coroner's inquest, or commission of lunacy, it being but an inquest of office. Str. 853.

The plaintiff ought to appear on every continuance of the jury in B. R. or an inferior court, otherwise it is error. R. Yel. 97. Vide ante, (V 1, &c.)

But no day is given to the defendant; for he is out of court. Yel. 97. R. 1 Sid. 16.

If it be executed on the return-day before the court rises, it is sufficient. R. Cro. El. 468. 761.

The execution of a writ of inquiry on a Sunday is void, and the court are bound to take notice of it, without being specially assigned for error. Str. 387.

If a writ of inquiry be returned executed, it is sufficient, though it is not said under the seal of the sheriff and jurors. R. 1 Rol. 408.

If it be *per sacramentum 12 proborum et legalium*, omitting *hominum*. R. 1 Rol. 408.

*Non assumpsit*, and *non assumpsit infra sex annos*, pleaded, an original replied, and, on *nul tiel record*, judgment for plaintiff; he cannot execute writ of inquiry till trial of the other plea. Barnes, 229.

It cannot be executed till judgment on demurrer is actually signed. Barnes, 229.

On *nul tiel record* replied, plaintiff may give notice of inquiry on the back of his replication. Barnes, 249.

It is irregular to execute separate writs of inquiry against joint defendants in actions of tort; and a judgment thereon for the damages separately assessed is erroneous; but the plaintiff may before final judgment set aside his own proceedings, on payment of costs, and execute a new writ of inquiry. 6 T. R. 199.

< So, after the execution of a writ of inquiry, if judgment be arrested on some of the counts, the plaintiff may, on payment of costs, have a writ of inquiry *de novo*, on the good counts. Callagan v. Hallett, 1 Caines' Rep. 104. >

Final judgment for damages is not erroneous, because the execution of a writ of inquiry on the roll, is not recorded. 4 Taunt. 148.

### (Z 3.) What proof necessary [or allowable].

If a writ of inquiry issues upon confession of the action, in trespass for taking goods, the plaintiff need not prove the property of the goods, but only the value. R. Yel. 152. Dal. 9. Dougl. 510.

[\*] On a writ of inquiry on judgment by default, defendant shall not give evidence of fraud in the plaintiff; for he has admitted the contract to be as plaintiff has declared. Str. 612.

< So, after default upon a promissory note, on the execution of a writ of inquiry, the defendant cannot go into evidence to prove, that the note was given without consideration, or upon an illegal consideration. Anon. 2 Hayw. 34.

On a writ of inquiry, the jury are bound to find damages for the plaintiff; for by the default, the defendant admits that something is due, though it may be but small. Parsons v. Cain, 1 Rep. Con. Ct. 196. Reigne v. Dewees, 2 Bay, 405. >

So, though the judgment be on *non sum informatus*, or *nil dicit*; for by the judgment *quod querens recuperet*, the property is affirmed. R. Yel. 152. 2 Cro. 220.

But in inquiry of waste, the jury may find no waste, if the waste be not confessed. Dal. 9.

And, in *indebitatus assumpsit*, if the judgment be by *nil dicit*, or *non sum informatus*, the plaintiff must prove his debt. R. 1 Vent. 347.

Where the declaration is on a bill of exchange or promissory note, it is sufficient to produce the bill or note; the only purpose of such production is to see whether any part of the money has been paid; and it seems not even necessary to produce the bill or note; for if part be paid, it ought to be pleaded. Vide 2 Str. 1149. Barnes, 233, 234. 2 Bl. 748. 2 Wils. 372. 3 Wils. 155. Dougl. 316. 3 T. R. 301.

So, on a writ of inquiry upon judgment against an executor or administrator by default, he shall not give in evidence no assets. Mod. Ca. 308.

A writ of inquiry shall not be for more than is contained in the judgment: as, in trespass for breaking a house, and taking and carrying away goods, if a demurrer is joined on breaking the house and taking the goods only, and by writ of inquiry damages are found for the carrying away also, it is error; for there was a discontinuance as to the carrying away. R. Yel. 5.

So, if the writ of inquiry recites a judgment for 400*l.* where it was only for 40*l.* though the bill was 400*l.* it is error. R. 2 Cro. 294.

If damages are given for necessaries provided after the writ of inquiry executed, or after the action commenced, it is error. 2 Ld. Raym. 1382.

The jury may give interest on note, bill of exchange, and money lent. *Per curiam*. And on *indeb. assump.* for goods sold. Per Montague C. B. Dissent. two B. Bunb. 119. Barnes, 228.

But not on balance of account. Barnes, 228.

After judgment on demurrer, it is not competent to the defendant to controvert any thing but the amount of the sum in demand. 1 Bos. & Pull. Rep. 368.

Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. Ibid. 369.

On a writ of inquiry in debt, for *del credere* commissions for guaranteeing an insurance, losses not indemnified cannot be deducted. 14 East, 578.

#### (Z 4.) Before whom it shall be executed.

The under-sheriff cannot appoint a deputy to see execution of inquiry; if he does, the court will grant attachment. Barnes, 231.

But if deputy is appointed under seal of sheriff's office, it is well. Barnes, 232.

{ So if it be executed by a sworn deputy of the sheriff. Tillotson v. Cheetham, 2 Johns. Rep. 63. }

Verbal appointment bad; it should be under hand and seal. Barnes, 413.

If defendant, an esquire, desires inquiry to be executed before judge at next assize, the court will grant it without affidavit. Barnes, 235.

{ So, if in an action for a libel, it appear, that important questions of law will arise on the execution of a writ of inquiry, the court will order it to be executed by the judge at the circuit. Tillotson v. Cheetham, 2 Johns. Rep. 107. }

So, if a writ of inquiry be executed before him who has no [\*] authority, it is error: as, in an inferior court, if it is directed to the serjeant at mace, and is executed before the mayor, who is judge of the court. R. Yel. 69.

So, if a *capias ad satisfaciendum* be issued before the writ of inquiry is returned, it is error. R. Yel. 71,

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If a writ of inquiry is erroneous, it shall not be amended ; but the plaintiff may have another writ. Pr. Reg. 559.

But misentry of a clerk shall be amended. R. 3 Mod. 112. R. 2 Cro. 372. R. Mod. Ca. 306. Adm. 1 Rol. 408. Vide Amendment, (S).

(Z 5.) When it may be quashed.

A motion to set aside an inquisition may be made at any time before final judgment signed. 2 Wils. 378.

A motion to set aside a writ of inquiry, is like one for a new trial made to the discretion of the court. Hence where, on executing a writ of inquiry in trespass for *mesne* profits, the jury did not include the costs of the ejectment, and the defendant, between the judgment in ejectment and action for *mesne* profits, became bankrupt, the court refused to set aside the inquisition to let in another, since the plaintiff might have proved the costs under the commission. 2 T. R. 261.

A writ of inquiry may be quashed after execution, for misdemeanor in the plaintiff. 2 Leo. 214.

Or, if there was not a regular notice. Sti. Pr. Reg. 558.

Irregular notice of executing a writ of inquiry, is cured by the defendant's lying by, and allowing the inquiry to be completed. 1 Anst. 175.

So, for misdemeanor in the sheriff; as, if he refuses to examine a witness. Pr. Reg. 559.

If he permits the plaintiff himself to be the only witness. Per C. B. M. 7 Ann.

If it is taken before two persons appointed under-sheriffs extraordinary, it shall be set aside. 2 Wils. 378.

So, if it is taken before an under-sheriff extraordinary, when the sworn under-sheriff lives in the same town. Ibid.

So, if the under-sheriff, who returns the jury, is attorney in the cause. Cowp. 112.

So, if the damages against the defendant are excessive. 2 Leo. 214. 3 Leo. 177.

As, if in dower one third of the value of the land be given without deducting reprises ; and for costs, the attorney's bill. Barnes, 234.

Two hundred and fifty pounds deemed excessive for twenty-six days' false imprisonment, and inquiry set aside for that cause. Barnes, 233.

But on 100*l.* damages given against custom house officers for entering and searching plaintiff's house with a writ of assistance without a constable, in the day-time; court would not set it aside for excessive damages. 3 Wils. 61.

Or, for time subsequent to the action brought. 2 Mod. Ca. 349.

But it shall not be quashed at the request of the plaintiff, for that the damages are too small. R. 2 Leo. 214. 3 Leo. 177. Sal. 647.

If the jury find no damages, it may be quashed, but not for smallness. Barnes, 230.

After no damages found, a special inquiry cannot issue without leave. Barnes, 231.

[\*]It may be set aside for smallness of damages, occasioned by sheriff's admitting improper evidence for defendant. Barnes, 448.

So, if some of the jury impannelled were debtors taken out of custody for the purpose of attending the inquiry. 4 T. R. 473.

If the witness plaintiff thought he could prove his demand declines it, and the sheriff refuses to adjourn, whereby plaintiff has but one penny damages for a large demand, the court will set aside the verdict. Str. 515.

If plaintiff is surprised with a defence, and not prepared to prove his whole demand, the court will set it aside. Str. 515.

On a contract for stock between A. and B. they deposit 200*l.* each in defendant's

hands ; B. does not perform, and A. sues for deposit, and had judgment on demurrer, and writ of inquiry ; but the jury, on a notion that the depositant could not pay the money without consent of both parties gave one penny damages, which the court set aside ; for the rule of not setting aside verdicts for smallness of damages does not extend to a case where the jury mistake in point of law. Str. 425.

Yet where the covenant is for a certain sum, whereon debt might be brought, a new writ of inquiry shall be awarded, if the whole debt is not found. 2 Mod. Ca. 197. 213.

It shall not be set aside, because returnable on a return-day, instead of day certain. Barnes, 230.

When executed, it is good, though the day and year are omitted in the *teste* of the writ. Barnes, 425.

It shall not be set aside, because taken in the name of plaintiff, who became bankrupt after inquiry awarded, but before it is executed. 2 Wils. 358.

Nor, because it has been altered, if released and not used before. Barnes, 232.

If a party appear on the execution of a writ of inquiry, he shall not afterwards object that the place was not within the county. Dougl. 797.

< If a writ of inquiry be executed on Sunday, and the inquisition returned to the sheriff, on Sunday, it will be set aside. Butler v. Kelsey, 15 Johns. Rep. 177.

So, if the plaintiff object to any of the jurors, privately, to the sheriff, and they are discharged ; for he ought to make his objections publickly. Ib.

So, if the sheriff refuse to hear evidence on the part of the defendant, the inquisition will be set aside, and a writ of inquiry *de novo*, directed. M'Clenachan v. M'Carty, 1 Dall. 377.

But the court will not set aside an inquisition upon frivolous grounds. Leib v. Bolton, 1 Dall. 82.

So, where the jury of inquiry found more damages than the amount laid in the declaration, the plaintiff was allowed to release the excess. Lewis v. Cooke, 1 Har. & M'Hen. 159.

So, the sheriff may amend an inquisition, after exception taken. Lewis v. Beale, 1 Har. & M'Hen. 185. >

### (Z 6.) When there shall be judgment upon it.

After a writ of inquiry executed, there must be four days exclusive before the plaintiff can sign the judgment. R. 1 Sal. 399.

Though the writ was executed the last day of the term. Sal. 399.

So, the plaintiff may give a rule for signing judgment, *nisi causa* within four days. Sal. 399.

If an action be brought on a judgment which is irregular, the whole proceedings may be set aside on one rule. 4 T. R. 688.

## (2 A.) PROCEEDING AND PLEADING IN PARTICULAR ACTIONS.

Pleading in an action by or against an attorney. Vide Attorney (B 21. 22.)

By or against an administrator. Vide post, (2 D 10, &c.)

### (2 A 1.) In actions by and against husband and wife :—In an action by husband and wife.

When husband and wife should join in an action by or against them, or when one shall sue or be sued alone. Vide Baron and Feme, (V—W—X.)

If a woman sues or is sued alone, when she is *covert*, or a husband[\*] when [\*291]

the wife ought to join or be joined, the writ shall abate. Vide Abatement, (E 6.—F 2.—F 7.)

An action of trespass for an injury done to the property of the wife, while sole, should be brought by the husband and wife. But if such action be brought by the wife alone, the defendant must plead coverture in abatement, and not in bar. 3 T. R. 627.

Two actions, one against a man and his wife, and another against the man alone, cannot be consolidated. 2 Wils. 227.

In an action by husband and wife, it is good, if the husband and wife appear in proper person; for though the husband has no privilege when his wife is joined, yet any one may sue in person. R. Cro. El. 537.

{ And it seems, that they appear by "their" attorney. *Frazier v. Felton*, 1 Hawks, 231. }

Where the wife is joined as co-plaintiff, the nature of her interest must appear in the declaration, or it will be bad on demurrer. 2 N. R. 405. 2 Blk. 1236. Unless the nature of the case implies an interest. 2 M. & S. 393. < Vide *Staley v. Barhite*, 2 Caines' Rep. 221. >

If husband and wife, seised for their lives, and to the heirs of the husband, allege a prescription in both; for though she has only for life, she was seized jointly with her husband who had the fee. R. Cro. El. 112.

So, in *assumpsit* by husband and wife *ut administratrix*, the declaration may say that the money was received *ad usum predict.* husband and wife, *ut administratrix*. R. 4 Mod. 376.

So, it is sufficient to say *ad. respond.* husband and wife *cui administratio*, &c.; for *cui* refers to the wife, who is last named. R. Latch, 212.

In covenant by the husband of tenant in fee, he must declare on a seisin in their demesne, as of fee in himself and his wife, in right of his wife. Dougl. 329.

If the declaration alleges a seisin in right of the wife, it ought to allege that both are seised (and not the husband only) in right of the wife. R. Lut. 1425. Per Lut. D: Lut. 1596.

And, if the seisin is for the life of the wife, it ought regularly to be averred that the wife is alive. Lut. 1596.

But a declaration by husband and wife is not good, if it alleges that the husband and wife *possessionat. fuerunt de bonis*, &c. in trover. Semb. 1 Sal. 114.

So, if in trespass it alleges battery of both: for the wife ought not to be joined for a battery of the husband. 1 Rol. 782. l. 10.

If in breach it be alleged that he did not execute to the wife while sole, nor to the husband and wife since marriage, without saying *aut eorum alteri*. R. Lut. 415.

If in trespass, *assumpsit*, &c. where the wife need not join, it is alleged *ad dampnum ipsorum*. R. 2 Cro. 473. R. 2 Cro. 644. R. 1 Sal. 114. R. 2 Rol. 250.

So, *assumpsit* for money lent by husband and wife *ad dampnum ipsorum*, is bad. 2 Mod. Ca. 341.

If, in trover, the conversion is alleged *ad dampnum ipsorum*. R. 1 Sal. 114.

{ So, in detinue for a chattel of the wife, the husband and wife cannot join, if the husband has had actual or constructive possession after the marriage. *Spiers v. Alexander*, 1 Ruff. 67. Vide *Walker v. Mebane*, 1 Murph. 41. }

If in trespass by them, it be *quare clausum fregit et herbam suam*, &c.

[\*] If, in battery by them for a battery of the husband and wife, it is alleged *ad dampnum ipsorum*. R. Mod. Ca. 149. Comb. 184.

Yet in trespass *quare clausum fregit et herbam ipsorum inde pervenien.*, &c. is good; for as they may join in a *clausum fregit*, so they may in the profits *inde*. Dan. 719.

So, if in an action for words of husband and wife, and if it be *ad dampnum* of both, it will be good. R. Jon. 409.

So, where the action survives, they may declare *ad dampnum ipsorum*. Dan. 720. R. 1 Sid. 387. 3 Mod. 120. Per two J. two cont. Pal. 339.

So, in trespass by husband and wife for the battery of the wife, *et alia enormia eis intulit*, is good. R. 2 Cro. 664.

{ But if the declaration contain a cause of action for which the husband might sue alone, as the loss of the company and assistance of his wife, &c. it will be bad on demurrer; but such defect will be cured by verdict. Lewis v. Babcock, 18 Johns. Rep. 443. }

In debt on bond conditioned for payment of a separate maintenance to the wife of the obligor, the breach must describe the arrear as due, not to the obligee, but to the wife. 6 Taunt. 140.

So, a defect in a declaration by husband and wife may be aided by verdict. Vide ante, (C 87.)—Vide Action, (G.)

In action for a demand not accruing to the wife *dum sola*, wife only taken in execution for costs, shall be discharged. Barnes, 207.

{ The husband of a feme covert, guardian in socage, must join in actions brought by her. Byrne v. Van Hoesen, 5 Johns. Rep. 66. }

So, husband and wife may join in a suit on a bond conditioned for their maintenance, during their joint and several lives; and if after judgment, the husband die, and afterwards, the wife die, the executors of the wife may bring *scire facias* on the judgment. Schoonmaker's Exrs. v. Elmendorf, 10 Johns. Rep. 49.

So, they may join in an action of account for rents and profits of the wife's land, accruing during coverture. Lewis v. Martin, 1 Day, 263. Sed vide Decker v. Livingston, 15 Johns. Rep. 479. *cont ut semb.*

So, in ejectment, for land set off to the husband and wife, by the levy of an execution issued on a judgment rendered in their favour jointly, for a debt due to the wife *dum sola*. Hammick v. Bronson, 5 Day, 290.

In an action against husband and wife, the ground of her liability must be explicitly alleged in the declaration. Gaylord v. Payne, 4 Conn. Rep. 190. }

## (2 A 2.) In an action against husband and wife.

{ The husband cannot be sued alone, for a debt of the wife, contracted *dum sola*. Angel v. Felton, 8 Johns. Rep. 115. 2d edit. Gage v. Reed, 15 Johns. Rep. 403. }

In an action against husband and wife, the husband shall give bail for himself and his wife.

If husband and wife are arrested for her debt whilst sole, she shall be discharged, and he lie till he puts in bail for both. Str. 1272. Vide 2 Bl. 720.

It ought to be against them in the *debet* and *detinet*, though it be for the debt of the wife *dum sola*. Vide post, (2 W 8.)

A judgment given on a declaration against husband and wife, on the contract of the wife *dum sola*, laying the promise as having been made by both since the marriage, is erroneous. 1 Taunt. 212.

*Assumpsit* against the husband for money lent to the wife, at the wife's request, is bad. 7 Taunt. 432. 1 Moore, 126.

{ So, husband and wife cannot be joined in *assumpsit*, where the promise is alleged to have been made by both, during coverture. Edwards v. Davis, 16 Johns. Rep. 281. }

In trover against them, it may be supposed that the conversion was by them; for it is a tort for which both may be charged. R. Yel. 165. R. 1 Rol. 6. l. 10.

But a declaration against husband and wife is bad, if the process was against the husband alone. 1 Sal. 115.

If the conversion be alleged *ad usum ipsorum*. R. 2 Cro. 661. Jon. 16. 264. R. Cro. Car. 254. 494. R. 1 Rol. 6. l. 10. 15. 27. R. Pal. 343. R. Jon. 443.

Yet, trespass against husband and wife for taking goods, is good, though the conversion is laid to be to their use; for the conversion is not the gift of the action, as in trover. Andr. 242:

{ So, trespass *quare clausum fregit* will lie against husband and wife, for a joint trespass by both. Wright v. Kerr, Addis. 13. }

And a suggestion of a *devastavit* by husband and wife executrix, *quod devastaver. et converterunt ad usum ipsorum*, is good; for the *devastaverunt* is the only material word, and that both may do. R. 2 Vent. 45.

{ Where husband and wife execute a conveyance of land, containing the usual covenants, the wife cannot be joined, in an action of covenant, she having no other interest in the subject of the contract, than the contingent right of dower; her acknowledgment having no other effect than to convey such right, and not binding her by the covenants contained in the deed. Whitbeck v. Cook, 15 Johns. Rep. 483. Vide Jackson v. Vanderheyden, 17 Johns. Rep. 167. Colcord v. Swan, 7 Mass. Rep. 291. Fowler v. Shearer, 7 Mass. Rep. 14.

If the husband be sued as administrator, in right of his wife, the wife must be joined. Moore v. Sattril, 1 Hayw. 16.

A married woman may be sued as a *feme sole*, whose husband has been absent at sea, and has not been heard of for 12 years. King v. Paddock, 18 Johns. Rep. 141. }

### [\*](2 A 3.) Plea, &c.

A defendant who has appeared by attorney as a *feme-sole* shall not plead in proper person, as a *feme-covert*, after a rule to stay proceedings on pleading issuably. 2 Bl. 724.

If A. and B. are sued as husband and wife, A. cannot plead *ne unques accouple en loyal matrimony*, for the legality of marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. Andr. 227.

In action against husband and wife, both ought to join in plea; and therefore if the wife alone comes and pleads, there shall be a replender. Yel. 210. Dan. 720.

The court cannot give leave to the wife to plead separately from her husband, even where her estate is settled on her, and confirmed by order of house of lords to her separate use, subject to demands on husband on her account; she must plead in the name of husband, and if he disavows, enforce the order of the lords. B. R. H. 101.

So, if the entry be *quod husband and wife ven. et defend. vim et injuriam et prædict. wife dicit quod ipsa non est inde culpabilis*. 2 Cro. 288.

Though the tort be supposed by the wife only, as, in battery against husband and wife for a battery by the wife.

So, in *assumpsit* against husband and wife, upon a promise of the wife *dum sola*. R. 2 Cro. 288. Yel. 210.

So, in an action for words spoken by the wife only. R. Yel. 210.

So, in battery against husband and wife and others, if the wife and others



plead not guilty, and the husband, *son assault*, it will be bad. R. 1 Brownl. 197.

So, in battery against husband and wife, if the husband justifies in aid of his wife, and the wife only pleads *son assault*, it is bad. R. 2 Cro. 239.

So, they ought to join in the averment, *et hoc parati sunt verificare*. Semb. Cro. Car. 594.

But where the tort is supposed by the wife alone, though both join in pleading, yet the issue ought to be, that the wife is not guilty: and therefore, in trover upon a conversion by the wife, if the husband and wife plead, *quod ipsi non sunt culpabiles*, it is bad, and a repleader shall be awarded, for it ought to be *quod ipsa non est culpabilis*. R. Cro. El. 883. R. Hob. 126. R. 2 Cro. 5. R. Cro. Car. 417. cont. in an action for words by the wife, for both are chargeable with a wrong done by the wife. R. acc. in action for words by the wife. 1 Brownl. 6. Pal. 68.

Yet in debt against them, they may plead *quod nil debent*. Noy, 41.

And issue *quod ipsi non sunt culpabiles* cannot be amended. 2 Cro. 530. R. cont. 1 Brownl. 7.

But if the dogget be *quod* husband and wife *placitant* not guilty, and the roll be *quod* the wife *dicit*, omitting the husband, it shall be amended; for it was only the misprision of the clerk; for the dogget was a warrant to him to enter on the roll a plea for both. R. 2 Cro. 530.

[\*]So, if the verdict finds that the wife alone is guilty, it aids the plea. R. Pal. 68.

In an action against husband and wife, if it be only for the wife's act, and she is found guilty, both shall be in *misericordia*; as, for words by the wife. Hob. 127. 1 Rol. 215. l. 25.

In trover for a conversion supposed by the wife. 1 Rol. 215. l. 45. 2 Cro. 439.

So, if there ought to be a *capiatur*, it shall be against both. R. Cro. El. 381. Mo. 704. R. 2 Cro. 203. 440. 1 Rol. 221. l. 35. R. Cro. Car. 407. but it shall be against the husband only. Cro. Car. 513. against both. 9 Co. 72. a. Q. Hob. 98. and it was against the wife alone. Hob. 101.

So, if the wife is executrix or administratrix, and there is judgment *de bonis testator si, &c. et si non tunc custag. de bonis suis propriis*, though properly the wife has no goods; for she will be liable after the death of her husband. R. 2 Cro. 191.

In trover, if there is judgment and execution against both, the court will not discharge the wife unless there is fraud and collusion between plaintiff, and the husband to keep her in custody. Str. 1167.

So, in battery by defendant's wife of plaintiff's wife, the court will not discharge the wife who is only in execution, if it appears there is no design to screen husband. Str. 1237. Wils. 149.

If husband and wife are taken in execution, the wife cannot be discharged. Barnes, 203.

But if husband and wife, after judgment, be rendered in discharge of their bail, and they be not charged in execution, the wife shall be discharged on motion. 3 Wils. 124.

If husband and wife be outlawed in debt on a bond given by the wife while sole, and goods sworn to be her separate property be taken in execution, the law adjudges them to be the goods of the husband: if she have any equitable right, she must have recourse to a court of equity. 2 Wils. 127.

So, after a solemn declaration by a woman, that she was married to a man, and that goods in his possession were his goods in her right, she shall never be allowed

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to say, as against creditors, that she was not married to him, and that the goods were her sole property. Cowp. 233.

In an action against husband and wife, the demand of a plea is necessary before judgment can be signed, as for want of one though the husband has entered an appearance for himself only. H. B. 235.

Upon the principle that the personal disabilities can only be pleaded in abatement, where a wife sues alone for a cause of action accrued to her *dum sola*, her coverture can only be so pleaded. 3 T. R. 627.

Coverture in the plaintiff since the writ sued out, and before declaration, can only be objected by plea in abatement. 6 T. R. 265.

**(2 B 1.) In actions by and against a corporation.—In an action by a corporation.**

In an action, by a corporation they ought to sue by the name of incorporation. 2 Inst. 666. Win. ent. 1100. { Bank of the United States v. Haskins, 1 Johns. Cas. 132. Legrand v. Hampden Sidney College, 5 Munf. 324.

So, in debt on bond to the trustees of a corporation, *solvendum* to the corporation, by its true name, the corporation may declare in their own name. New-York African Society v. Varick, 13 Johns. Rep. 38.

So, an action on a bond to the committee of an ecclesiastical society, and their successors, may be sustained in the name of their successors. Bailey v. Lewis, 3 Day, 450.

So, a town may sue by the description of A. B. and the rest of the inhabitants of such town, instead of using the corporate name only. Barkhamstead v. Parsons, 3 Conn. Rep. 1. }

Where a corporation sold land by auction upon certain conditions, and the purchaser agreed with the mayor on behalf of himself and the corporation, to fulfil the conditions of sale : held, that the mayor could not sue on the agreement. 2 Taunt. 274.

[\*]And may sue by that name, though enabled to sue by another name. Sal. 451.

And the christian name of the mayor or head is not necessary. 12 Ed. 4. 10. Dy. 86. b.

Though it be in ejectment on a demise by a corporation. Skin. 2.

But a corporation may prescribe to be incorporated by one name, and to be impleaded by another. Th. Dig. l. 3. c. 9. s. 9.

Or, may claim it by grant. Th. Dig. l. 3. c. 9. s. 12.

A sole corporation must always shew *quo jure* he is seised. R. 2 Lev. 68.

And shall be named by his name of baptism. Dy. 86. b.

And if persons are incorporate to the use of an hospital, they must say, *seised jure corporationis suæ* not *jure hospital*. R. 10 Co. 34. a.

But mayor and commonalty need not allege *seisin jure corporationis* ; for name imports an incorporation. 1 Leo. 153.

So, *custos et colleg. Onnium Animarum Oxon.* need not allege *seisin jure collegii*. R. Cro. 232. Pl. Com. 102.

In making title under a charter of incorporation, after stating an acceptance, it need not be averred that the grantees exercise the privileges in question, since having accepted the charter, they are bound to act under it, and if they do not, the court of king's bench will compel them. 1 T. R. 589.

{ When a corporation sues, either in a real or personal action, they must, at the trial, shew, that they are a corporation, or be nonsuited. Jackson v. Plumbe, 8 Johns. Rep. 295. 2d edit. Vide Bank of the United States v. Haskins, 1 Johns. Cas. 132. Dutchess Cotton Manufactory v. Davis, 14 Johns. Rep. 245. Per THOMPSON, Ch. J. Bill v. Fourth Western Turnpike Road, 14 Johns. Rep. 416.

But where a corporation is created by a private act of the legislature, in order to sustain a suit, they must set forth such parts of the act, as are necessary to shew, that they are a corporation, and have power to sue. *Central Manufacturing Co. v. Hartshorne*, 3 Conn. Rep. 199. Vide *Middletown Bank v. Rugs*, 3 Conn. Rep. 135.

So, where in an action by a corporation under a particular name, the defendant pleads *nul tiel corporation*, in bar, the plaintiffs must reply specially, shewing how they were made a corporation, if their charter require certain things to be done by them, before they can become a corporation. *Bank of Auburn v. Aikin*, 18 Johns. Rep. 137.

A corporation cannot sustain an action upon a contract not authorized by their charter. *Utica Ins. Co. v. Scott*, 19 Johns. Rep. 1. >

### (2 B 2.) In an action against a corporation.

In an action against a corporation, they must be sued by the name of incorporation. 2 Inst. 666.

And, if it be an aggregate corporation, it is not well to name the proper name of the head. Bro. Corporation, 6.

But if it is a sole corporation, the proper name may be mentioned. Bro. Corp. 5, 30.

And so it must be in personal actions, where outlawry lies.

If a corporation be misnamed, it may be pleaded, but it is only in abatement. 26 H. 8. 1. b. Bend. pl. 89.

So, it may be pleaded in abatement, if the name of the head be added and mistaken. Bro. Corp. 6.

Or, if a corporation and another are joined; for there is different process against him. Adm. 45 Ed. 3. 2, 3. Cont. 46 Ed. 3. 23. b.

Though the person joined be a member of the corporation. Bro. Corp. 13. 24.

Or, in an action upon a specialty, if the name varies from the specialty, Th. Dig. l. 6. c. 12. s. 16.

To misnomer in a personal action, the plaintiff may say, known by one name or the other. Th. Dig. l. 6. c. 12. s. 14. 16.

Otherwise in a real action; for he cannot hold the land but by his true name. Th. Dig. l. 6. c. 12. s. 14.

And he, who pleads an act of a corporation by one name, and afterwards by another, ought to shew how the name was altered. 3 Lev. 243.

For a duty or charge on a corporation every particular member is not liable; but process ought to go in their public capacity. 1 Ventr. 351. cited Cowp. 85. > Vide *Commonwealth v. The Blue Hill Turnpike Corporation*, 5 Mass. Rep. 420, *Southmayd v. Russ*, 3 Conn. Rep. 52. >

[\*] The process against an aggregate corporation is distress. 45 Ed. 3. 3. a.

But process of outlawry does not lie against an aggregate corporation. 45 Ed. 3. 2, 3.

And therefore trespass does not lie against them, but only against particular persons; for *capias* and *exigent* do not go. Bro. Corp. 43. { Vide *Lynch v. Mechanics' Bank*, 13 Johns. Rep. 127. *Nichols v. Thomas*, 4 Mass. Rep. 232. *Tippets v. Walker*, 4 Mass. Rep. 595. *Riddle v. Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. Rep. 186. Per PARSONS, Ch. J. }

So, a *subpœna* does not lie; for it has no conscience. D. 2 Bul. 233.

But in chancery, if it has nothing whereby to be distrained, on a petition to the lords in parliament, it may be ordered, that if the corporation do not  
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appear on a *distringas* issued, the bill shall be taken *pro confesso*. Ca. Cha. 205.

Proceedings in chancery against a corporation for a contempt, cannot lie against the offending parties personally, but must be by sequestration of their effects and estate. Cowp. 377.

It is not sufficient, if the particular persons distrained appear at the return of the process. Bro. Corp. 28.

Or, if all the members of the corporation appear in person. Bro. Corp. 28.

But the corporation must appear by an attorney, appointed under their common seal. Bro. Corp. 28.

In pleading, a mayor and commonalty may prescribe, that they and their predecessors, &c. though the commonalty have no predecessors. 39 H. 6. 14.

If a man makes cognizance as bailiff to a corporation, he need not shew how they were incorporated. R. 3 Lev. 107.

If a man pleads an act by a corporation, he need not allege a deed; for it shall be intended; as, if he makes cognizance as bailiff to corporation, 3 Lev. 107. Bro. Corp. 1. 51.

If he pleads a presentation to a church by a corporation. Bro. Corp. 24.

A lease for life, without a deed to make livery. Pl. Com. 149. b.

A feoffment to them, without a deed to receive livery. 2 Cro. 411.

Entry for a forfeiture. Cro. Car. 169.

Acceptance of rent, or of a man to be their tenant. 2 Sand. 305.

A fine levied or deed inrolled. 1 Leo. 184.

What things a corporation may do without deed or not, vide Franchises, (F 11, 12, 13.)

But if he justifies under a corporation, he ought to shew a deed. Bro. Corp. 54.

As, an entry by command of dean and chapter. Bro. Corp. 59.

A corporation is not entitled to an *essoign*, since they can only appear by attorney. 2 T. R. 16.

< A corporation may be liable to an action on a contract, not under seal, and also upon implied promises. Danforth v. Schoharie and Duaneburgh Turnpike Co. 12 Johns. Rep. 227. Dunn v. Rector, &c. of St. Andrew's Church, 14 Johns. Rep. 118. Randall v. Van Vechten, 19 Johns. Rep. 60. Powell v. Trustees of Newburgh, 19 Johns. Rep. 284. Hayden v. Middlesex Turnpike corporation, 10 Mass. Rep. 397. Bulkley v. Derby Fishing Co. 2 Conn. Rep. 252. White v. Derby Fishing Co. 2 Conn. Rep. 260. Head v. Providence Ins. Co. 2 Cranch, 127. Bank of Columbia v. Patterson's Admr. 7 Cranch, 299. Legrand v. Hampden Sidney College, 5 Munf. 324. Fleckner v. Bank of U. S. 8 Wheat. 338. Colcock v. Carvey, 1 Nott & M'Cord, 231.

An information in nature of a *quo warranto* will lie against an incorporated company, for carrying banking operations, contrary to their charter. The People v. The Utica Ins. Co. 15 Johns. Rep. 358. Vide State v. City Council, 1 Rep. Con. Ct. 36.

So, a corporation is liable in trespass on the case, for neglect of a corporate duty. Riddle v. Proprietors of the Locks and Canals on Merrimac River, 7 Mass. Rep. 169. Gray v. The Portland Bank, 3 Mass. Rep. 364.

So, for a tort. Chesnut Hill Turnpike Co. 4 Serg. & Rawle, 6.

So, a corporation is liable to an action by one of its individual members. Waring v. Catawba Co. 2 Bay, 109. >

(2 C 1.) In actions by and against an infant:—In an action by an infant. Must sue by guardian or *prochein amy*.

If an action be commenced by an infant, he must sue by guardian or *prochein amy*, as the court pleases. Co. Lit. 135. b. F. N. B. 27 H. Adm.

2 Cro. 641. Dy. 56. a. 2 Inst. 261. Semb. Cro. Car. 86. R. Cro. Car. 161. Semb. 1 Sid. 69. Lit. 60. R. Jon. 177. { Vide M'Daniel v. Nicholson, 2 Rep. Con. Ct. 344. Bradwell v. Weeks, 1 Johns. Ch. Rep. 325. }

[\*]And the king may appoint him a general guardian. F. N. B. 27. L.

So, he may appoint him two or three to be guardians jointly or severally, or to appoint others under them. F. N. B. 27 L.

A *prochein amy* shall be appointed by virtue of the stat. W. 2. 13 Ed. 1. 15. which enacts, that if an infant who would sue, be *esloigned* that he cannot do so in person, his *prochein amy* may be admitted to sue for him. 2 Cro. 641.; and was appointed before in assize by the stat. W. 1. 48.

And this extends to all cases where an infant sues, though he be not *esloigned*. 2 Inst. 390. 261.

So, he ought to appear to be an infant; for if he sues at full age by guardian or *prochein amy*, it is error. 2 Inst. 261. Semb. 2 Cro. 580. 1 Bul. 24.

If an infant sues or defends by a guardian, such guardian must have a warrant. F. N. B. 27. J. 2 Inst. 261. 3 Mod. 236.

And therefore such guardian must be admitted by the court. Cro. Car. 86. { Vide Kid v. Mitchell, 1 Nott & M'Cord, 334. }

So, must a *prochein amy*. 2 Inst. 261.

But a *prochein amy* need not have a warrant. F. N. B. 27. J.

A general admission of *prochein amy*, to prosecute and defend all suits, is sufficient. Str. 304.

And if he sues by guardian, without saying *per curiam hic specialiter admiss.*, it is error. 1 Lev. 224. Semb. 4 Co. 53. b. 3 Mod. 236.

And the defendant need not plead, till the plaintiff shews the rule for his admittance by guardian or *prochein amy*. Sti. Pr. Reg. 264.

If the court appoints a guardian for an infant, he ought to be in person in court. 2 Lea. 189.

And if he has not a guardian by *socage*, &c. the court may assign an officer of the court to be guardian or *prochein amy* for him. 2 Inst. 261.

If the guardian by *socage* or by testament acts, no other shall be assigned, unless he misbehaves himself. 1 Sid. 424.

But if the declaration says, *per curiam specialiter admiss.*, it is sufficient, though there be no admission on the roll. R. in B. R. where there are many precedents acc. which make the law in such case. 4 Co. 53. b. for it shall not be error, but only a misdemeanor in the agent employed in the cause. P. 21. Car. 2. Pr. Reg. 38.

So, in C. B. R. 1 Sid. 173.

And if there was an admission, though no entry thereof on the record, it shall be amended. R. Cro. Car. 86. Hut. 92. 1 Lev. 224.

If an infant sues by guardian or *prochein amy*, he cannot afterwards remove his guardian or disavow his *prochein amy*. F. N. B. 27. K.

But an infant may have a writ out of Chancery to remove him. F. N. B. 27. M.

Or, the court may remove him at their discretion. Ibid.

As, in an appeal by an infant, the court may discharge the guardian assigned, and discontinue the suit. R. 1 Rol. 288. D.

[\*]And therefore, if an infant sues by attorney, it may be pleaded in abatement.

And this since the st. 21 Ja. 13. which aids a suit by him by attorney after a verdict. 2 Sand. 213.

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So, if an infant sues by attorney, it is error. R. in Exch. 2 Cro. 5. R. 1. Rol. 287. l. 25. Adm. 2 Cro. 250. R. Cro. El. 424.

Though judgment be given for the infant.

So, if he sues without saying by whom, which shall be intended in proper person. R. 1 Vent. 103. D. Sho. 165.

So, if he commences a suit by attorney, and afterwards proceeds by guardian. R. Mo. 665.

Or, commences by guardian, and afterwards, during his infancy, proceeds by attorney; for this will be a discontinuance. R. 2 Cro. 252. Co. Ent. 289.

So, though he sues in another right, as executor or administrator. R. cont. Cro. El. 541. 1 Rol. 288. l. 10. but a *quere* is made. 1 Rol. 288. l. 10. Agr. 2 Sand. 212. R. M. 1649. Colt and Sherwood and inter Peyton and Dorce, cited 1 Vent. 103. 1 Mod. 298. And so are the precedents. Lut. 227. 368. 371. R. Carth. 122. D. 1 Vent. 54. Acc. F. g. 1.

So, though he sues a writ of error. D. 1 Rol. 287. F. N. B. 27. H. 2 Cro. 250.

But, if an infant sues by guardian, and after his full age proceeds by attorney, it is well. R. Mo. 665. 2 Cro. 580.

So, by the st. 21 Ja. 13. in ejectment or personal actions, if an infant sues by attorney, it shall be aided after verdict.

And by the st. 4 & 5 Ann. 16. after judgment by confession, *nil dicit, non sum informatus*, or after writ of inquiry executed.

So, if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error; for those of full age may make an attorney for all. R. cont. 2 Cro. 303. Dub. 2 Cro. 289. Semb. cont. 1 Keb. 940.

As, husband and wife may sue by attorney, though the wife is an infant. D. 2 Sand. 213.

So, several executors or administrators may sue by attorney, though some are within age; for all represent the person of the testator, and sue in another right. R. Cro. El. 378. 1 Rol. 288. l. 15. R. per three J. Twisd. cont. 2 Sand. 213. 1 Vent. 102. 1 Mod. 296. 1 Lev. 299.

So, in replevin, if the defendants as bailiffs to A. make cognizance by attorney, and one is an infant, it is no error; for they are in the nature of plaintiffs, and make cognizance in another right. Dub. 3 Mod. 248. R. per three J. Holt cont. Sho. 170.

So, the defendants avow in their own right, and one is an infant. Semb. cont. Yel. 58.

Plaintiff's attorney must give defendant's notice of guardian's place of abode. 1 Wils. 246.

{ If an infant sue by *prochein amy*, whose mother is alive, the writ shall not abate; but if the defect is material, it is ground for a motion to stay proceedings. Trask v. Stone, 7 Mass. Rep. 241. }

[\*](2 C 2.) In an action against an infant.—Must defend by guardian.

So, in an action against an infant, he must appear only by guardian, for he has not knowledge of his own affairs, or to choose a man to plead well for him, and may have an action against his guardian, if he loses by misleading. R. sæpius, 2 Rol. 287. l. 10. 20. Dy. 104. b. { Mockey v. Grey, 2 Johns. Rep. 192. }

And therefore, if he appears by *prochein amy*, it is bad. F. N. B. 27. H. R. 2 Cro. 641. Co. Lit. 135. b. Semb. Cro. Car. 86. 161. Hut. 92. R. 2 Rol. 257.

So, in all actions real, personal, or mixt against an infant, if he appears by attorney, it is error. D. 8 Co. 58. b. D. 9 Co. 30. b. R. 2 Cro. 10. R. Sæp. 1 Rol. 287. l. 20. 747. l. 10. R. Cro. El. 569. Mo. 460. R. in error upon a judgment in Ireland. 3 Keb. 384. R. 2 Leo. 189. Adm. Vel. 211. 2 Cro. 254. R. Jon. 432. { Arnold v. Sandford, 14 Johns. Rep. 417.

A court of equity will not proceed against an infant unless defended by a guardian *ad litem*. Beverleys v. Miller, 6 Munf. 99. Jones v. Mason, 2 Tay. 125. }

Though there was not any warrant of attorney upon record. R. Jon. 432.

Though he be sued in another right, as executor, or administrator. R. 2 Cro. 441. 1 Rol. 287. l. 50. 1 Rol. 380. Poph. 130. Per two J. 3 Bul. 180.

An infant executor, though joined with another of full age, cannot be sued by attorney, though they might sue. Str. 783.

So, if several defendants appear by attorney, and one is an infant, it is error, and the judgment shall be reversed against all. R. 2 Cro. 289. 1 Rol. 776. l. 25. R. 2 Cro. 330. R. Al. 74. R. 1 Lev. 294. R. F. g. 1.

So, if husband and wife being vouched in a common recovery, appear by attorney, and the wife is within age. Dub. 1 Rol. 288. l. 20. 1 Rol. 303. R. 5 Mod. 209.

So, in a personal action, if husband and wife appear by attorney, when the wife is within age. R. 1 Vent. 185. 2 Lev. 38. R. cont. Sho. 13.

So, in replevin, if two avow by attorney, and one is an infant. Dub. Sho. 13. 3 Mod. 248. R. that it shall not be assigned for error; for it was pleadable in abatement. 1 Sal. 93. 205.

And it is sufficient, if he was an infant at the time of the judgment, though he arrived at full age before error brought. Per two J. Cro. El. 569. Dub. Cro. El. 853. 5 Mod. 209.

And such error shall be tried by the country, and not by inspection.

{ Vide Sliver v. Shelback, 1 Dall. 166. }

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended, and made *per guardianum*. Str. 114.

But if there is not an express undertaking to appear, it cannot be done. Str. 445.

If an infant, defendant, appears and pleads by guardian, regularly he ought to be admitted such before he appears or pleads. Sti. Pr. Reg. 265.

But if he is not admitted, it is not error, but only a misdemeanor in the attorney. Sti. Pr. Reg. 265.

[\*]And regularly the admission ought to be *ad defendendum*; for if the guardian for the defendant is admitted *ad prosequendum*, it is bad. R. 2 Cro. 641.

Yet if a guardian is admitted *ad sequendum*, it is good; for this may be applied indifferently to the plaintiff or defendant. R. in a common recovery. 2 Sand. 95. 1 Sid. 446.

Or, *ad prosequendum*; for he prosecutes his defence. R. 2 Mod. Ca. 25.

If an infant does not name a guardian to appear by, the court will give leave to plaintiff to do it. Str. 1076.

The court will, at the instance of the plaintiff, compel a minor, defendant, to appear by guardian. 7 Taunt. 488. 1 Moore, 250.

[\*300]

If infant served with process to appear by attorney, appears by attorney, the court will make rule for him to appear by guardian, or plaintiff to be at liberty to name one to appear and defend. Barnes, 418.

Plaintiff's attorney should apply to defendant to name guardian, and if he does not in six days, apply to the court to oblige him to do it. 2 Wils. 50.

Judgment will not be arrested because a change of the guardian has not been entered. 4 Taunt. 765.

In an action against a defendant, who is an infant, the plaintiff may declare, as against another person; for if he is not chargeable in respect of infancy, the defendant shall plead that he is within age. Vide post, (2 G 3. —2 W 22.)

And therefore by his declaration he need not allege that the thing done by him was for necessities; for, after nonage pleaded, the plaintiff may shew in his replication that it was for necessities. R. Jon. 146.

If in an action against an infant, he demurs, he may waive it in the said term, and plead to issue. R. 2 Bul. 69.

After plaintiff has proceeded to judgment against an infant, as if he was of age, he cannot have the appearance in person struck out, and have appearance by guardian entered. Barnes, 413.

A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. 8 T. R. 335.

Therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c. wrongfully and injuriously rode the mare so that she was damaged, &c. it was holden that the defendant might plead his infancy in bar, the action being founded on a contract. Ibid.

Infancy is no ground for discharging the defendant a common appearance. 1 B. & P. 480.

{ In an action against several defendants, on a joint and several contract, and one of them avails himself of infancy, the plaintiff may enter a *nolle prosequi* as to him, and proceed to judgment against the others; and the jury may find a verdict for the infant, and a verdict for plaintiff against the other defendants. Hartness v. Thompson, 5 Johns. Rep. 160.

A judgment rendered against an infant, by default, is erroneous. Wilford v. Grant, Kirby, 116. Knapp v. Crosby, 1 Mass. Rep. 479.

So, if judgment be rendered against an infant on *nihil dicit*; after an appearance in *propria persona*, and an imparlance. Sliver v. Shelback, 1 Dall. 165. Moore v. M'Ewen, 5 Serg. & Rawle, 373.

Infants are bound by judgments rendered against them under the protection of the court. Britton v. Williams, 6 Munf. 453. }

## (2 D 1.) In actions by and against an executor or administrator.—In an action by an executor.

What actions he shall have or not, vide Administration, (B 13, 14, 15.)

In an action by an executor for a thing which he demands in right of his testator, he ought to name himself executor, otherwise the defendant may plead in abatement. Vide Abatement, (E 21.)

And it is not sufficient to name him executor in the *alias dictus*. 20 H. 6. 5.

[\*]If there are several executors, all must join in the action. Reg. 140. d. b. Vide Abatement, (E 13, 14.)

Though some do not prove the will, but refuse before the ordinary. R. 9 Co. 37. R. 1 Lev. 161. { But Vide Burrow v. Sellers, 1 Hayw. 501. }

Though one was within age. R. 2 Sand. 213. 1 Sid. 449.

Though the executor, who proves the will, takes administration during the minority of the other executor, who was within age, and not joined in the probate of the will. R. 1 Brownl. 101. Yel. 130. R. cont. 2 Lev. 240.

In all actions by an executor, (as executor), the writ must be in the *detinet* only, though the duty accrued in his own time. R. 5 Co. 31. b. Reg. 139. b. F. N. B. 119. M.

As, if an executor brings debt against a lessee for rent incurred after his testator's death. 5 Co. 31. b. R. Cro. Car. 225. R. 1 Lev. 250. Semb. cont. Skin. 5.

Or, for an escape on a recovery by himself as executor. R. 5 Co. b. Cro. El. 326. Sav. 130. but Periam cont. R. 2 Cro. 546. R. Sho. 57. Carth. 49. Comb. 114. R. Hob. 272.

So, debt in the *debet* and *detinet* for an escape in the time of the testator is ill after verdict. Semb. Ld. Raym. 698.

Or, for money due on a sale by him of the goods of the testator. Reg. 140. a.

So, in all cases where the money recovered is assets, it may be in the *detinet*. R. 1 Lev. 231.

Yet, in action upon his own contract, it may be in the *debet* and *detinet*, though he is named executor: as, in debt for rent on his own lease of land, which he had as executor. R. 2 Cro. 685.

In debt on the st. Ed. 6. for not setting out tithes, where he has the rectory as executor. Cited to be R. 2 Cro. 545.

And, if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *e contra*, it is substance. R. 2 Cro. 546.

But now it is aided after verdict by the stat. 16 & 17 Car. 2. 8. R. 1 Sid. 342. 379. 1 Lev. 251.

And by the st. 4 & 5 Ann. 16. on a general demurrer.

If executor brings action of debt in the *debet* and *detinet*, instead of *debet* only, it is aided after judgment by confession, by stat. 4 Ann. c. 16. Ld. Raym. 1513.

So, if the plaintiff omits *profert in cur. litteras testamentarias*, it is bad on a special demurrer. Vide ante, (O 3.—O 17.)

But where an executor brings an action which will be in his own right, though he name himself executor, he need not make *profert* of the letters testamentary. Ld. Raym. 1215.

Though it be on a *scire facias* upon a judgment by the testator. R. Sho. 60.

In a *scire fieri* inquiry, on judgment recovered by an executor, it is not necessary that it be alleged, that the testator is dead. Str. 631.

But in an action by an executor for an escape out of execution on a judgment by him as executor, he need not; for this is a tort to him, though the damages recovered are assets. R. Hob. 38.

So, if money belonging to a testator be received by another person after the testator's death, his executor may maintain an action for money had and received in his own right. 2 T. R. 476. Willes, 103.

[\*] In such an action the defendant cannot set off a debt due to him from the testator. Ibid.

Where money due to the testator is paid over to a third person after his death, the executor may declare in his own right. 2 T. R. 476.

An administrator having recovered a judgment for a debt due to the intestate need not declare as administrator in an action on the judgment. Dougl. 4.

A judgment recovered by an administrator belongs to himself personally, therefore he need not declare in his representative character, in an action either upon

the judgment or for the escape of the debtor taken in execution thereon. 2 T. R. 126.

Where the conversion was after the death, the executor may declare on his own possession, whether ever actually possessed or not. 10 East, 293.

If an executor pays money which he is entitled to recover back, he must declare in his personal character. 4 T. R. 561.

And if the plaintiff names himself executor or administrator, when the suit is in his own right, it will be but surplusage. 1 Vent. 119.

So, an executor may be sued in the *detinet* only, though the plaintiff may be entitled to sue in the *debet* as well. 3 East, 2.

If the executor of the surviving executor do not shew that the first executors proved the will, it is bad; but it is aided after verdict. Str. 716. Ld. Raym. 1441.

An executor cannot add a count in his own right. Str. 1271. 1 Wils. 171.

An executor cannot join a count upon a bond given to his testator, and a count upon a bond given to himself as executor in the same action. 3 Bos. & Pul. 7.

In *assumpsit* brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. 7 T. R. 182.

< An executor may maintain an action while he is resident abroad. Griffith v. Frazier, 8 Cranch, 9.

In an action by an executor for a debt barred by the statute of limitations, and a new promise has been made to the executor, he must allege the promise to him, as executor. Beard v. Cowman, 3 Har. & M'Hen. 153. >

## (2 D 2.) In an action against an executor.

What actions lie against him, vide Administration, (B 14, 15.)

So, in an action against an executor, as executor, he must be named executor. Vide Abatement, (F 20.)

Or, must be shewn to be executor; for, if the declaration shews the defendant to be executor, though it does not name him executor, in the beginning, it is sufficient. Semb. 1 Sand. 112.

In B. R. calling defendant executor in the declaration, is sufficient, without a special averment. Str. 781. Ld. Raym. 1510.

If the defendant be executor *de son tort*, he shall be named executor generally; for there is no other form of writ or count. R. 5 Co. 31. a.

If an action be against several executors, and only one appears, or is taken, the plaintiff may proceed and have judgment against all. R. 1 Sal. 312.

In an action against an executor for a mere personal thing, as executor, the writ shall be in the *detinet* only. 1 Bul. 22. Reg. 139. b.

So, an action against an executor for rent due, part in the life of the testator, part in his own time, may be in the *detinet* only. R. Al. 76.

So, debt for rent in the *debet* and *detinet*, when the rent is more than the value of the land, is bad; for if this appears upon the plea it ought to be in the *detinet* only. R. Pol. 133.

But if the duty accrues in the time of the executor, it shall be in the *debet* and *detinet*. R. 5 Co. 31. Cro. El. 712.

[\*]But judgment was reversed (for another cause as it seems.) Vide Cro. El. 712. Dy. 81. b. in marg. 2 Cro. 546. 4 Co. 31 b. in marg. 1 Bul. 23. R. 2 Cro. 238. 1 Bul. 22. R. 2 Cro. 411. 549. R. Al. 34. R. 1 Mod. 185. Pol. 129.

In such action the executor cannot plead that he waived the term. R. Cro. Jac. 549. Poll. 125.

Yet it may be in the *detinet* only. R. Dy. 81. b. in marg. R. Al. 34. 42. Pol. 129.



So, if the action be against an executor, on a judgment *de bonis propriis*, it shall be in the *debet* and *detinet*. 1 Rol. 603. l. 12. { Vide *Spotswood v. Price*, 3 Hen. & Munf. 123. }

So, in debt against an executor, upon a suggestion of a *devastavit*. R. 1 Sand. 217. 1 Sid. 398. R. 1 Lev. 147. 256.

Where the plaintiff had recovered judgment against a testator in his life-time, and afterwards had judgment of execution against the executors in *scire facias*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a *devastavit*; held that the executors being fixed conclusively with assets by such latter judgment, the issue upon *non detinet* lay upon them to prove the due administration of such assets; otherwise the plaintiff was entitled to recover. 3 East, 2.

A declaration against an executor, suggesting a *devastavit* brought in the *detinet* only is cured by verdict. Ibid.

But semble, independent of the verdict, the plaintiff on such a declaration may take judgment *de bonis testatoris*. Ibid.

The plaintiff cannot have an action in *detinet* for part, and in *debet* and *detinet* for the residue. R. 3 Lev. 74.

In an action against an executor, the plaintiff need not allege assets, for it shall be intended. 9 Co. 24. a.

So, if it be against an executor of an heir, on a bond of his ancestor. R. Dy. 344. b.

In debt on bond, the plaintiff must aver, that it is not paid by the testator's heirs, or that it is still due. Ld. Raym. 1546.

In an action against an administrator, on promises of the intestate, an *insinuati computassent* with the administrator, as such, of money due from the intestate, does not make him personally liable. 1 H. Bl. 102.

An executor cannot be charged as such, either for money had and received by him, money lent to him, or on an account stated of money due from him as such; those charges making him personally liable. 1 H. Bl. 108.

The personal representative of a tenant may be charged in his representative character for breaches of covenant by one to whom the premises have come by assignment since the death. 10 East, 313.

{ If the indorser of a promissory note, die before it becomes due, in an action against his executor, the promise to pay must be alleged to have been made by the executor, if by his testator, it will be fatal. *Stewart v. Eden*, 2 Caines' Rep. 121.

In order to save the statute of limitations, the plaintiff may allege a promise to have been made by the executor. *Whitaker v. Whitaker*, 6 Johns. Rep. 112.

A count on a promise by an executor, &c. as such, may be joined with a count on a promise of the testator; and whether the promises be in the same, or distinct counts, is immaterial. *Carter v. Phelps' Admr.* 8 Johns. Rep. 343. 2d edit.

Upon a covenant to warrant the title to personal property, in which the covenantor binds his heirs, without mentioning his executors, an action will, nevertheless, lie against them. *Lee v. Cooke*, 1 Wash. 306.

So, an action of covenant respecting real estate, will lie against executors, though not specially bound. *Harrison v. Sampson*, 2 Wash. 155.

The executor of an executor represents the testator; therefore, an action may be sustained against the second executor, as the executor of the testator, without noticing the first. *O'Driscoll v. Fishburne*, 1 Nott & M'Cord, 77. }

Qu. Can an executor be sued as such for a legacy left by the testator? Ibid. Dig. Executor, VII. (a. 3.)

### (2 D 3.) Pleas to an action by an executor.

If an action be brought by an executor, the defendant may plead in abatement that the plaintiff is not executor. Vide Abatement, (E 22.)

Or, another executor not named. Vide Abatement, (F 13.)

{ But, it seems, that the plea must state, that they were qualified, and

took upon themselves the burthen of executors. *Burrow v. Sellers*, 1 Hayw. 501. }

So, defendant may plead in bar, that she had the goods as wife *pro apparatu*, and there are *assets ultra*.

That A. administered before probate, and gave or sold the goods to him. *Dub. Carth.* 104.

{ The absence of an executor, is not a good bar. *Griffith v. Frazier*, 8 Cranch, 9.

But executors residing abroad, or who never acted in the administration of an estate, need not, necessarily, be made parties to a suit. *Clifton v. Haig*, 4 Des. 330. }

**[\*](2 D 4.) To an action against the executor.—In abatement.  
—Administrator not executor.**

So, if an action is brought against an executor, he may plead in abatement that he is administrator, not executor. 2 Vent. 178. 1 Sal. 296. 1 Leo. 69.

In such plea he must shew that administration was well granted to him.

And therefore, if the archbishop granted it, he must shew in what dioceses the intestate had *bona notabilia*, whereby it may appear that it was in his province. R. Lut. 30. Semb. 2 Leo. 155. Cro. El. (156.)

But this is no plea for an executor of his own wrong, if he afterwards takes administration. R. Cro. El. 102.

So, he shall shew in what diocese the intestate died. Lut. 30. Semb. Pl. Com. 277. a.

And at what time administration was committed. R. 2 Vent. 180.

And that he had *bona notabilia* to such value; for to say that he had generally, is not sufficient. R. 8 Co. 135. a.

So, he shall show that the archbishop had authority to grant, for that there were *bona notabilia*, &c. 2 Leo. 155.

Or, that the bishop had good authority. Cro. El. 791.

But the defendant need not traverse *absque hoc* that he administered as executor, for this is more proper from the other side. Semb. Hob. 49. Lut. 30. R. inter Bower and Cook in B. R. M. 7 W. 3. 5 Mod. 145. 1 Sal. 297. R. cont. Lut. 890. Semb. cont. Yel. 115. 2 Vent. 180. Cont. 7 H. 6. 13. R. 1 Sal. 298.

R. acc. 3 T. 242. though Lutw. and Vent. were cited. Ld. R. 63.

And the court said it was the better way of pleading, to omit the traverse. 3 T. 243.

Such a traverse vitiates the plea. D. Ld. R. 64.

But the plaintiff may reply, that he intermeddled before administration granted. R. 1 T. 21.

And the traverse of his being administrator will not vitiate such a replication. R. 1 T. 21.

In an action against a man as executor, he pleaded that the deceased made his will, and J. S. executor, and that administration was granted to him with the will annexed before the suit commenced, so that he was administrator not executor; the plaintiff replied, that he intermeddled before administration granted and traversed, that he was administrator, and upon a special demurrer upon account of the traverse, the traverse seemed to be given up, but the court notwithstanding gave judgment for the plaintiff. 1 T. 21. P. C. Note, It is not very clear whether the court did not give judgment on account of the insufficiency of the plea, because it did not traverse the intermeddling.

Nor, that A. made him executor. Semb. cont. Yel. 115. R. acc. 5 Mod. 145.

Otherwise, if he is sued as administrator, and pleads that he is executor to A. and not administrator, he must traverse *absque hoc quod A. obiit intestat.* 9 H. 6, 7. 7 Ed. 4. 13. 3 H. 7. 14. 4 H. 7. 13. a. R. per tot. Cur. Yel. 115. Dub. Dy. 202. a. Semb. Dy. 236. b. 5 Mod. 145.

[\*]And in such plea he need not produce the letters of administration. R. upon a special demurrer. Lut. 16. Vide ante, (O 17.)

**(2 D 5.) Administration to a stranger, and not to him.**

So, the defendant may plead that administration was committed to a stranger, and not to him.

**(2 D 6.) Another executor not named.**

So, he may plead another executor not named. [But it must be added that the other has administered. 1 Lev. 161. 3 T. R. 560.] Vide Abatement, (F 10.)

Or that the plaintiff is a co-executor with him. 3 T. R. 557.

But the plaintiff may reply that he never proved the will, or took upon himself the execution, or accepted the appointment, or administered as executor, and such replication will be good. R. 3 T. R. 557.

But he cannot plead another action against himself as heir. R. 3 Lev. 304.

So, to an action brought against him as administrator generally, where he is administrator *durante minori ætate*, he may plead that in abatement, but he must aver that he continues administrator *durante*. &c. 1 Ld. Raym. 265.

**(2 D 7.) In bar. *Ne unques executor, &c.***

So, to an action against an executor he may plead in bar, *ne unques executor.* Cl. Ass. 74. Win. Ent. 341.

That he renounced, and *nulla bona devenerunt ad manus.*

But an executor, who proves the will, though he does not otherwise administer, cannot plead *ne unques executor.* 27 H. 8. 11. a.

{ So, after a plea of *plene administravit*, the defendant cannot withdraw his plea, and plead *ne unques executor*; especially, when the cause is set down for trial. State v. Boone, 1 Har. & Johns. 134. }

So, if there are two executors, and the one proves it in the name of both against the will of the other; yet he cannot plead *ne unques executor*, nor administered as executor. R. cont. 27 H. 11. a.

So, an executor shall not plead that his testator was outlawed. R. Hut. 53.

If a man is administrator, he cannot safely plead *ne unques executor*, though it was antiently done. 5 Mod. 145. R. 1 Sal. 296.

If another be administrator, *durante minori ætate* of an executor to whom the defendant has accounted, he cannot plead that fact, with a traverse that he never administered *alio modo*; for the plea does not admit him ever chargeable as executor. R. Sav. 121.

To a plea of *ne unques executor*, the plaintiff may reply that the defendant has administered. Win. Ent. 341.

{ Executors cannot plead judgments rendered against them since the last continuance. Churchill v. Howard, 2 Hayw. 335. Vide Littlejohn v. Underhill, 2 Car. Law Rep. 579. }

**(2 D 8.) *Non est factum, non assumpsit.***

So, an executor may plead in bar the same bar that his testator might have pleaded; as, *non est factum testator, non assumpsit testator, &c.*

[\*305]

And if he says *non est factum suum*, it is good ; for *suum* refers to the testator. R. after verdict. Latch, 125.

So, *non assumpsit* generally is good ; for it shall be referred to the testator. R. 1 Lev. 184. 1 Sid. 292.

[\*]An executor having pleaded *non assumpsit*, and a specialty which covered the assets, shall be permitted to withdraw the first plea, on payment of such costs only as were occasioned by that plea. 2 Bl. 1275.

To debt against an executor suggesting a *devastavit*, not guilty may be pleaded as well as *nil debet*. 1 T. R. 462.

## (2 D 9.) *Plene administravit* [and outstanding day.]

So, an executor may plead in bar, *plene administravit*. 2 Sand. 220. Bro. V. M. 215.

Wherever an executor is sued as such, so that no judgment could be given against him for the cause of action in that suit, except *de bonis testatoris*, he may plead *plene administravit*. Semb. 3 F. 150.

Although the action might have been so framed as to have entitled the plaintiff to judgment for the cause of it *de bonis propriis*. Semb. 3 F. 150.

Therefore in an action against an executor in the *detinet* for rent accrued in his own time, he may plead *plene administravit*. Ibid.

But in an action upon a judgment he must shew how he has administered, otherwise the plea will be bad upon a special demurrer. R. Ld. R. 3.

Though it will be unobjectionable on a general one. Vide Ld. R. 4.

An executor cannot give evidence of the payment of legacies upon the plea of *plene administravit*. 12 Vin. 185. pl. 1.

{ On a plea of *plene administravit*, the *onus probandi* lies on the defendant. *Platt v. Robins*, 1 Johns. Cas. 276. *Brown v. Lane*, 2 Hayw. 159. }

In an action for a debt of higher nature than simple contract, a plea of *plene administravit* must shew that the defendant had fully administered before the plaintiff commenced his action. R. Ld. R. 708.

A plea to an action by bill, that after the commencement of the plaintiff's action, J. S. exhibited a bill and recovered judgment against defendant as executor, and that before the exhibiting of the said bill of the said J. S. the defendant had fully administered, does not. Ld. R. 708. P. C.

And that, in whatever manner he dischargeth himself of the estate that was the testator's. Semb. 1 Mod. 174. Atkins, cont.

As, where a special verdict found that the defendant being executor, *durante*, &c. had paid such and such debts and legacies, and had delivered over *totum residuum status personalis* of the testator to the infant executor when he came of age. Id. Ibid.

Under a plea of *plene administravit* to debt on a judgment which is not docketed, payment of bond (and simple contract) debts, exhausting all the assets, may be given in evidence. 6 T. R. 384.

A plea of *plene administravit* by an executor of an executor, must go as well to the administration by his immediate testator as by himself, or must shew that he has no assets of his immediate testator. 10 East, 315.

A marriage covenant with a trustee for securing provision for the wife, may be given in evidence by her under *plene administravit*, when sued as executrix ; and she may retain out of the personal assets, so much as is equal to the damages she has sustained by the breach of such covenant. 2 Blk. 965.

But this is no plea, if he is sued in the *debet* and *detinet*. R. 1 Sid. 334. 1 Mod. 185.

Otherwise, if sued as executor, though chargeable otherwise. Dub. 1 Sal. 317.

Or, a special *plene administravit*, viz. a judgment, statute, specialty, or

retainer, and no assets *ultra*. 1 Sand. 329. 333. 2 Sand. 49. Co. Ent. 146. a.

A judgment on a simple contract. R. 1. Sid. 333. R. 3 Mod. 115. 1 Lev. 200. R. Vau. 94.

So, a judgment against one only, where there are several executors. [\*]Semb. Cro. El. (471.) R. 1 Sid. 404. Cont. Cro. El. 41. but there the judgment was *pendente lite*.

So, a judgment against himself as administrator; for he need not plead in abatement, if it was a just debt. R. 1 Lev. 261. R. Cro. El. 646. R. 1 Sid. 404. Acc. Co. Ent. 149. a.

So, a specialty before the day of payment. R. 3 Lev. 57. Cro. Car. 363.

So, a judgment confessed by him to a creditor upon a suit, after the present action commenced. R. 1 Sid. 21. Vau. 95. R. 1 Sal. 310. 1 Lev. 201. [Com. 87.]

But if to a *scire facias* against him on a judgment against the testator, he plead *plene administravit* generally, without showing how, it will be ill on special demurrer. Ld. Raym. 3, 4.

So, where the defendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators, awarded that he as administrator should pay, &c. he cannot plead *plene administravit* to debt on the bond; for by submitting to the award he has admitted assets. 1 T. R. 691.

He may plead judgments without setting forth the consideration of them. Str. 407.

An erroneous judgment is a good bar, if not fraudulent. Ibid. Per Eyre, J.

If an executor does not plead a judgment against his testator, to the action, he shall not afterwards plead it to the *scire facias*. Str. 732.

But an executor *de son tort* shall not plead payment of debts, though he may give it in evidence upon *plene administravit*. Per Holt. Carth. 104.

Such an executor cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor after the action is brought. 3 T. R. 587.

If an executor has a term for years of less value than the rent, and he is sued for the rent in the *debet* and *delinet*, he may plead that he has no assets, and the land is of less value, and pray judgment if he shall be charged, excepting the *delinet*. 1 Sal. 297. 317.

If an executor pleads *plene administravit*, the plaintiff may pray execution of assets *cum acciderint*. 2 Sand. 216. Cont. Cro. Car. 373. Acc. 8 Co. 134. a. Hob. 199. R. 1 Sid. 448. 1 Vent. 94. 1 Lev. 286. 1 Sal. 312.

If he pleads *plene administravit præter*, so much, which exceeds the demand in the declaration, the plaintiff shall take judgment by confession. R. Yel. 138.

To a plea of *plene administravit præter*, the plaintiff may pray judgment of the sum admitted by the plea, and reply assets *ultra*. 3 Wils. 52.

Or, reply assets or assets *ultra*, &c. Co. Ent. 148. b. Vide Ent. 176. 1 Sand. 334.

And he must allege the venue, where the assets are. R. 3 Lev. 311.

So, the plaintiff may reply that the statute, &c. is burnt. Per three J. Vau. cont. 1 Mod. 186.

That it was performance of covenants which are not broken. Co. Ent. 147. 132. Win. Ent. 307.

Or, that the judgment, &c. was obtained or continued by fraud. [\*]Cont. [\*307] [\*308]



Cro. El. (462.) Acc. Lut. 662. Cont. Mo. 705. if it be not traversed. R. Jo. 92. R. 8 Co. 132. b.

If an executor, or heir, plead to an action, on a bond or simple contract, an outstanding judgment; the plaintiff may reply, that it was not doggeted and entered pursuant to the statute. 1 B. & P. 307.

That the statute was extended, and a *liberate* sued and accepted. R. 3 Lev. 269.

And he may, by replication, answer to one only, or to every judgment pleaded. R. 1 Lev. 281. R. 1 Sand. 337. 2 Sand. 50. R. 4 Mod. 64. 1 Sal. 310. [1 Ld. Raym. 263.]

But where the defendant as administrator pleaded six judgments against him *ultra quæ* he had not assets, and the plaintiff replied that four were obtained by fraud, and that there were assets beyond the other two, and concluded to the country, this was held ill on special demurrer; for by pleading six judgments he confessed assets over five, and the plaintiff by replying assets beyond two, tendered an issue, which would be against the defendant by his own confession; but if plaintiff had concluded by a verification, it would only have been surplusage. 1 Ld. Raym. 263.

Or, say that only so much is due on all the judgments, and he has assets *ultra*. R. 3 Lev. 311. Semb. per C. B. M. 9 An. cont. 3 Lev. 368. for the whole is due for which the judgment or penalty was.

Or, that he paid so much on one judgment, and so much on the other, and the judgments are continued by fraud, though he speaks of them jointly. R. 2 Mod. 36.

Yet, a rejoinder that the judgments are not continued by fraud, is bad; for it ought to say, that they or any of them, &c. R. Cart. 221. R. 5 Mod. 64.

So, the defendant in his rejoinder must not traverse the inducement, but the fraud. R. Jon. 92.

That he brought another action which abated, and he sues now by *journeys accompts*, and that the defendant had assets at the time of the first original sued. R. 2 Rol. 187.

To which the defendant ought to rejoin no assets at the day of the first original, and cannot say *et prædict. D. similiter*. R. 2 Rol. 186.

If the plaintiff replies that the judgment was by fraud, he may rely upon the fraud generally, or traverse the special matter. R. 2 Sand. 50.

A judgment, confessed by an executor, for more than what is due, is not conclusive of fraud. He may therefore shew, that the entering up for more than the sum due was through mistake, and was made known to the plaintiff before action brought. 5 T. R. 80.

Where in a plea by an executor of a former judgment recovered, a less sum by mistake is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to amend the record, by inserting the real sum in the plea, though the application for such amendment be not made till three years after the record has been made up; and they will in such case allow the plaintiff to reply *per fraudem*. 1 H. Bl. 238.

And the defendant in his rejoinder must traverse the fraud. Ld. Raym. 678.

[\*]So, the plaintiff may say, that the judgment was given after the testator's death, and continued by fraud; for such judgment is void. R. 2 Mod. 303.

So, the plaintiff may conclude his replication *et sic per fraudem*, or rely on the special fact, which is fraud. R. Lut. 1637.

In what order debts are to be paid, vide Administration, (C 2.)

If the plea of *plene administravit* is, that the defendant *nulla habet bona*, without more, it is bad.

Or, that *plene administravit*, omitting *et quod nulla habet, &c.* R. 3 Lev. 28.

Or, *nulla habet bona nec habuit, die impetrationis billæ*, without saying *nec unquam postea*, it is bad. R. on demurrer. 2 Cro. 132.

So, *nulla bona die exhibitionis billæ*, for he should say *die impetrationis*. R. Lut. 1637, 8.

Nor, shall it be aided by a verdict, except where it is expressly found that he had no assets before plea. 2 Cro. 132.

So, if he pleads a judgment against the intestate upon a *scire facias* against himself, on the st. 8 & 9 W. 3. 11. it will be bad; for the judgment ought to be against the executor or administrator himself, and so it must be pleaded. R. 1 Sal. 42.

But *nulla habet bona, quæ fuerunt testatoris tempore mortis suæ*, is good; for it shall not be intended that goods are come to him, which the testator had not at his death, and if it be so, it shall be shewn on the other side. R. 2 Cro. 132.

And that he had no goods when he first had notice of the plaintiff's suit, is sufficient. Pl. Com. 279. a. Sho. 184.

If the defendant pleads a judgment, he must shew in what court, and when obtained. R. 1 Mod. 50.

If several judgments, and one is not well pleaded, it will be bad on a general demurrer. 1 Mod. 50.

If an executor or administrator suffers judgment by default, he admits assets. Mod. Ca. 306. R. 1 Sal. 310. [Com. 87.]

So, if he does not plead *plene administravit*. R. 1 Sal. 310.

If to an action on bond, he plead payment, omitting to plead *plene administravit*, and a verdict be given against him on such plea it operates as an admission of assets, in an action founded on that judgment suggesting a *devastavit*. 3 T. R. 685.

Though the judgment be against him *pendente lite*; for he should have pleaded it. R. 1 Sal. 310. [Com. 87.]

If he pleads twenty judgments, he admits assets for all. R. 1 Sal. 312.

If he pleads a judgment for 1700*l.* for principal and interest, and that he has only 40*l.*, if the judgment as to interest be bad, the plaintiff shall have judgment; for assets shall be intended for the residuc, it not being expressly averred to the contrary. R. 2 Lev. 40.

So, if the defendant pleads no assets *ultra*, &c. it is not well to say, that he has no assets *præter bona quæ non attingunt*, or *non sufficien. ad satisfaciendum* the judgment, statutes, &c. pleaded; for no issue can be joined upon such uncertainty.

Or, that he has no assets *ultra* what will satisfy. Per Vau. 104. R. 1 Sid. 210.

[\*]So, if he says that *nulla habet bona præter bona ad valentiam*, and after says *nulla alia bona habet præter bona quæ non sufficiunt*; for this is repugnant. R. 9 Co. 109. b.

But he ought to say that he has not assets *præter* so much, (naming the sum certain,) which is liable to the judgment, &c. 1 Sid. 210.

Or, *præter bona sufficien. ad satisfaciendum* the judgments, &c. for this imports that he has sufficient for all the judgments, &c. pleaded. Per Vau. 103. R. 9 Co. 109. b.

But then, if the plaintiff replies that one of the judgments was satisfied, [\*310]

and the defendant demurs, it will be against the defendant, for his plea is falsified. Per Vau. 103. 9 Co. 109. b.

So, no assets *præter bona ad valentiam denar. solut. ad satisfaciendum* the judgments, &c. is good, though one of the judgments be discharged. Per Vau. 104.

And no assets *præter bona non attingen. ad 5l.* when the judgment was for 100*l.*, is good on a general demurrer. Per two J. Hob. 133.

And *præter bona quæ non attingunt, or non sufficiunt, &c.* is form only. R. 1 Lev. 132.

If he plead *plene administravit præter* a certain sum, and afterwards to another action brought in the same terms, *plene administravit præter* the same sum, and as to that sum, state that he had confessed it in another action, this is a good bar. Doug. 452.

In *plene administravit*, if the defendant alleges a judgment, he need not shew that it was for a just debt. Per two J. Dod. cont. 2 Cro. 626. R. 1 Lev. 200. Qu. if it is not misprinted. 1 Sid. 333. Lut. 662. R. on a special demurrer. Carth. 8.

So, if he alleges a statute acknowledged, he need not shew that it was *pro vero et justo debito*; for it may be for performance of covenants. R. 2 Cro. 835. R. cont. on demurrer. 2 Cro. 102.

In an action of debt on bond against an administrator, the defendant pleaded a bond debt due to himself and a retainer, and it was holden unnecessary to aver in such plea that the bond was given for a just and true debt. 6 T. R. 550.

So, if he alleges a debt due to the king. R. cont. 2 Cro. 182.

So, in *plene administravit*, the defendant need not allege that his testator *per scriptum obligat. concessit*; for it is not traversable: and no one shall plead *non est factum* but the party himself, his heir, executor, or administrator. R. Lut. 662.

If he pleads several judgments, he may conclude each with an averment, or it may be more properly at the conclusion of the whole. 1 Sal. 312.

But if the defendant pleads several judgments, and no assets *ultra*, if any judgment be defective, the plaintiff shall have judgment; as, if one of the judgments was against the testator and others, and it does not appear that the testator survived, so that he might be chargeable. R. 2 Sand. 50. R. 1 Sal. 312.

If one of the judgments was in an inferior court which does not appear to have jurisdiction. R. 8 Co. 133. a. R. 3 Lev. 141.

If to debt on bond defendant plead, that creditor by simple contract had obtained judgment against him in the sheriff's court, in debt as upon *concessit solvere*, according to the custom of London; he must add, that administrator is bound to pay it, as if due on obligation; and he must shew that the contract was made within the city, or it will be bad. Andr. 340.

[\*] A plea of judgment recovered on a simple contract pleaded to debt on bond, must aver that such recovery was had before notice of the bond debt. 1 T. R. 630.

If a recognizance was by the testator and another, and it is not averred that the other was not paid. R. 9 Co. 110. b.

If one of the judgments be found fraudulent; for though he pleads that he has only 5*l.* *ultra* all the judgments, this is only form, and not traversable. R. 1 Sal. 312. R. 1 Brownl. 49.

If one of the judgments was in debt, where it ought to be in *assumpsit*. R. 1 Vent. 198.

And the fairest way is to plead the judgment, and shew how much is due thereon. R. 1 Sal. 312.

Where a bond is forfeited in the life-time of testator, the penalty is the legal debt, and on issue what is due must cover so much assets; but on a bond where the day of payment is not come, the assets are covered only for the sum in the condition. Str. 1028. B. R. H. 219. 5 T. R. 309.

An executor may plead as an outstanding debt the penalty of a bond of indemnity given by the testator to the obligee, who is surety for him in another bond, both of which were forfeited in his life-time, and still unpaid, though the surety has not yet been damnified. And an averment that the bond was forfeited in the testator's life-time, not showing how, is sufficient. 5 T. R. 307.

To a special *plene administravit*, if the plaintiff replies that the judgment was obtained, or continued, by fraud, it is sufficient to allege generally that it was by covin, without shewing the special matter. 9 Co. 110. a.

So, it is sufficient to say, it was by covin of the executor or administrator only. R. 9 Co. 110.

So, it is sufficient to say that the recognizance, &c. was for payment of a less sum, or for performance of covenants generally, and that the sum is paid in satisfaction, or no covenant broken, without mentioning the time or manner. R. 9 Co. 110. a.

And payment in satisfaction is sufficient, without saying that the conusee was ready to acknowledge satisfaction. R. 9 Co. 110. a.

And acceptance in satisfaction is a sufficient ground to say that the recognizance is continued by covin. 9 Co. 110. a.

If the defendant pleads several judgments, the plaintiff may reply to each severally, or to all, or part, or one, at his election. R. 1 Sal. 298. R. Sho. 289. Skin. 299.

If he replies to part, continued by fraud, he cannot reply to the others, assets *ultra*; for this is admitted. R. 1 Sal. 298.

If an executor pleads bonds and judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and that the defendant had assets *ultra* the judgments, and the first issue is found for the defendant, the plaintiff cannot have judgment though the assets are found to be *ultra* the judgments pleaded. Com. 206.

If the plaintiff replies, obtained or continued by covin, the defendant may traverse or join issue thereon. 9 Co. 110. a.

If an executor pleads *plene administravit*, and, after issue *relicta verificati-one* confesses judgment, this is a confession of the debt, but not of assets. R. 1 Rol. 929. l. 25. Hob. 178.

If the plaintiff replies after judgment pleaded, that he prays [\*]execution *cum assets acciderint*, assets afterwards shall be in the first place applied to the judgments. R. 1 Sal. 312.

If the plaintiff on a *plene administravit* does not pray execution, when assets shall happen, but joins issue that there are assets, and it is found against him, the judgments shall be, *quod querens nil capiat*. 1 Rol. 929. l. 20. Cro. Car. 373. Hob. 199.

If assets are found, though to a small value, there shall be judgment for the whole debt. 1 Rol. 929. l. 15. but the execution shall be only for the assets found. R. acc. Cro. El. 318. but the clerks say, that the precedents are otherwise. Vide Precedents otherwise, Town. Jud. 68. R. acc. Cro. Car. 167. 373. R. 8 Co. 134. Dub. Mo. 246. Cro. El. 592.

But now, on a plea of *plene administravit*, the executor shall be liable only to the amount of the assets in his hands. 3 T. R. 688.

If there are two executors, and one is outlawed, and the other pleads *plene administravit*, there shall be judgment against both for the debt, but  
[\*312]

for damages and costs against him only who pleads. R. 1 Rol. 928. l. 47. 930. l. 5.

So, if both plead, and it is found that one has, and the other has not assets, there shall be judgment against both. R. 1 Rol. 929. l. 30.

Otherwise, if they plead severally by several attornies; for then he, who has not assets, shall be quit. R. 1 Rol. 929. l. 50.

If plaintiff can only have judgment *de bonis testatoris*; *plene administravit* is a good plea in covenant, though the breach assigned is for non-payment of rent incurred in their own time. 1 Wils. 4.

If executor or administrator suffers judgment by default or confession, and an action is brought on that judgment, suggesting *devastavit*, he cannot plead *plene administravit*; and so if he dies, and the action is against his executor or administrator. 1 Wils. 258.

After rule to plead issuably, he may plead judgment confessed on bond since rule. Barnes, 330.

But after such rule the court will grant further time, that another judgment may be perfected, that he may plead it. Barnes, 333.

A retainer may be either pleaded or given in evidence under *plene administravit*. 3 Burr. 1380.

A plea of retainer by an executor or administrator, need not aver that the debt is a just one, since that is presumed. 6 T. R. 550.

## (2 D 10.) In an action by an administrator.

In an action by administrator, he ought to be named administrator.

Administrator shall bring an action on an assignment of bail-bond given to him as administrator, and not in his own name. Fort. 370.

If administration be granted to him upon refusal of the executor, who died intestate, it may be omitted. Reg. 141. a.

Yet, if it is not omitted, it is not bad. Dub. Dy. 236. b.

If there are several administrators, all must be joined. Reg. 140. a.

So, he must shew by whom administration was granted. 2 Cro. 89. R. 1 Sal. 38.

And it will not be aided on a general demurrer. R. 1 Sal. 38.

And, if it be granted by a peculiar jurisdiction, he must say at least, *cui pertinuit*, &c. or *loci illius ordinar.*; for by such an one *sanct.[\*] theolog. professor.*, or by such an one *decan. abbat*, &c. is not sufficient. 35 H. 6. 46. R. Mo. 367. Cro. El. 431. 791. D. 2 Cro. 556. D. 1 Sid. 228. R. Lut. 408. R. Sho. 355.

Yet, the omission of *cui pertinuit*, &c. shall be aided after verdict. R. 4 Mod. 133. Sho. 355. Skin. 551.

*Et debito modo commiss.* imports it. R. upon demurrer. 1 Sal. 40.

But if administration be alleged to be granted by the king, it is sufficient, without more; for his authority is known. R. upon demurrer, Al. 53. 1 Sid. 302.

Where administration is granted by an archbishop, the plaintiff ought to shew that the intestate had *bona notabilia* within more than one diocese in the archbishop's province. D. Ld. R. 635.

A temporary administrator must shew that his administration continues. Ld. R. 408.

And the omission will be fatal on a demurrer to the declaration. Ld. R. 408.

But no advantage can be taken of it after the defendant has pleaded. R. Ibid.

In an action by an administrator *durante minori ætate* of an executor, an allegation that the executor is within age, shall be taken to imply that he is under twenty-one, and is therefore bad. Ibid.



An administrator ought to shew that administration was granted to him. Semb. Ld. R. 634.

And that the person he represents died intestate. Ibid.

But a defendant can take no exception on account of the omission of either of these particulars after he has pleaded in bar. R. Ld. R. 634.

So, if alleged to be granted by an archbishop or bishop. R. Cro. El. 6. 907. 879. Adm. Cro. El. 791. Semb. cont. Cro. El. (456.) R. 2 Leo. 155. D. 1 Sid. 302. R. Cro. El. 838. R. Lut. 1266.

Or, by an archdeacon; for he is *oculus episcopi*. R. 2 Cro. 556. 1 Sid. 302. R. 1 Lev. 193. R. 2 Rol. 150.

Or, by the official or commissary of a bishop. R. 2 Mod. 65. R. Lut. 9. 1 Sal. 41.

Or, by the vicar-general of a bishop; for this means his chancellor. 1 Leo. 312.

Yet, though a general allegation of grant of administration by an archbishop or bishop is sufficient in a declaration, or inducement to a traverse, it is not sufficient in a bar or replication, for that must shew how he has authority. 2 Leo. 155. Cro. El. (456.) 791. 838. Vide ante, (2 D 4.)

So, it must appear when administration was granted.

But grant of administration of the goods *quæ fuerunt intestati tempore mortis* is sufficient, without saying it was granted *post mortem*, &c. for the other words import it. R. Cro. El. 907.

So, if an administrator sues in the *debet* and *detinet*, except on his own contract, it will be bad. Vide ante, (2 D 1.)

So, if the plaintiff omits *profert litteras administ.* in his declaration, it will be bad on a special demurrer. Vide ante, (O 17.)—(2 D 1.)

But default of shewing by whom administration was granted, shall be aided after a verdict, by the st. 16 & 17 Car. 2. 2. 1 Sal. 38.

Or, by plea of *non est factum*, or other collateral matter. R. 1 Sal. 38.

[\*]An administrator, *durante minori ætate* A. the executor must allege that A. is under the age of seventeen years: for under twenty-one is not sufficient. R. 5 Co. 29. a. Cro. El. 602. Agr. 2 Cro. 590. Vau. 93. Vide Administration, (F).

And if he be administrator during the minority of several, he must allege that all are under seventeen; for an averment that three are and nothing said of the fourth, is not good. Dub. 5 Co. 9. Dub. after verdict, 1 Sid. 185. R. 2 Jon. 48.

And the defendant may plead that the executor has attained his age of seventeen years. Per three J. Cro. Car. 516. 1 Rol. 910. l. 30.

So, an administrator *pendente lite*, or during the absence of A., must shew that A. is absent, &c. R. Mod. Ca. 304. 1 Sal. 42. [Ld. Raym, 1071.]

The authority of an administrator appointed according to the provisions of the statute 38 Geo. 3. c. 87. during the absence of an executor from this country, does not become void on the death of such executor, but is only voidable; therefore a plea of the death of such executor is bad. 3 Bos. & Pull. 26.

But an averment that A. is within age generally, is sufficient after verdict, Cro. Car. 240.

So, no averment, if the defendant does not take exception to it, but pleads in bar, is good; for thereby he admits the plaintiff to be able to sue him. R. Lut. 632. Per Ch. J. 2 Rol. 466.

And the judgment is not void. R. 1 Rol. 910. l. 20.

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So, in an action by an administrator *durante minori ætate* of A. who is no executor, but only entitled to administration, it is sufficient if he alleges that A. is under twenty-one years; for in such case the administration does not determine at the age of seventeen years. R. Rot. 102. (1 Ld. Raym. 667.) An. Rot. 340. (Com. 159.) Vide Administrator, (B 6.)

If administrator of executor has a verdict, judgment shall be arrested; there should be administration *de bonis non*. Barnes, 444.

(2 D 11.) In an action against an administrator.

In an action against an administrator, it must be alleged that administration was granted to the defendant. R. 2 Vent. 84.

Naming defendant administrator in declaration, sufficient averment, without setting out that administration was committed to him. Barnes, 159, 160.

< So, on a promise of an administrator to pay a debt of the intestate, he must be sued as administrator. Forbes v. Perrie, 1 Har. & Johns. 109. >

But *debita juris forma concessit* is sufficient, without saying by whom it was granted. Cont. 2 Cro. 10. R. acc. 2 Jon. 1. R. Lut. 301. R. 1 Sid. 228.

And in an action against an administrator, if he pleads, original purchased before administration granted, there is no occasion to shew by whom it was granted; for the plaintiff by his action against him admits him to be a legal administrator. Lut. 9.

In an action against the defendant as administrator, it is not necessary for him, in his plea, to set out letters of administration; for the plaintiff, by his declaration, admits him to be a lawful administrator. 6 T. R. 550.

And if the action be against an administrator during the minority [\*] of another, he need not allege that the other is within 17 years, for a stranger cannot know when his authority determines, and if it be determined, the defendant ought to shew it. R. after verdict, 2 Cro. 590. R. Yel. 128. R. Hob. 251. Per Wind. 1 Sid. 57. R. Vau. 93.

And therefore he may be charged by a stranger as administrator *durante minori ætate*, if he continues in possession after the executor attains seventeen years. Semb. 1 Sid. 57. Vide Administration, (F).

Or, may be charged upon the special matter. 1 Sid. 57.

(2 D 12.) Pleas by an administrator.—In abatement.

To an action against an administrator, he may plead in abatement that he is not administrator, but executor. Vide Abatement, (F 20.)—Vide ante, (2 D 4.)

If he be sued as administrator generally, who is administrator during the minority of another. Lut. 20.

Who administered *circa funeralia tantum*, &c. 37 H. 6. 28. a. Another administrator not named. Vide Abatement, (F 10.)

If he pleads that he administered in a special matter only, and traverses the administration *modo et forma*, he must shew that he did that which would be an act of administration. R. 37 H. 6. 28. a.

That the original is tested before the administration granted. Lut. 8. Vide Abatement, (G 6.)

(2 D 13.) In bar.

So, an administrator may plead in bar *ne unques administrator*. Ast. Ent. 286. Cl. Ass. 117. Vide ante, (2 D 7.)

*Plene administravit* general or special. Vide ante, (2 D 9.)

But if he pleads retainer, it is not sufficient to say that administration was committed, without saying that it was committed to him. R. 2 Jon. 23.

So, it is no plea in bar that he is executor, not administrator. R. Skin. 365.

An administrator trustee in intestate's marriage settlement, who covenanted to leave by will, or that his executors, &c. should pay 700*l.* to trustees, to pay the interest to his wife for life, then to divide among the children, and if none, as he should direct, may plead *plene administravit*, and give retainer in evidence, and plaintiff will be nonsuited, and cannot have judgment of assets *quando acciderint*; for if defendant dies before the widow and the co-trustee, the money will be out of his hands at her death. 3 B. M. 1380.

### (2 D 14.) Pleas to an action by an administrator.

So, to an action by an administrator the defendant may plead in abatement that there is another co-administrator living not named. Vide ante, (2 D 2.) —Vide Abatement, (E 14.)

But he cannot plead that another has the right to the administration. R. 1 Mod. 231.

Yet he may plead that another is executor: but if the property be laid in [\*] the intestate, he cannot give in evidence that there is an executor; it should have been pleaded in abatement. Otherwise if the property be laid in the administration. Per Holt. *Ld. Raym.* 824.

< So if a feme sole administratrix marry pending a suit, it shall abate. *Swan v. Wilkinson*, 14 Mass. Rep. 295. >

Or, in bar, that administration was never committed to the plaintiff. *Han. Ent.* 105. *Cl. Ass.* 117.

And this, if it was committed by a bishop or peculiar, when it does not belong to him. Vide Administrator, (B 5.)

So, that the intestate at his death resided out of the diocese of the bishop who granted the administration. 1 Sal. 37.

So, that administration was granted to another. 1 Sal. 38.

### (2 D 15.) Judgment against an executor or administrator. When *de bonis propriis*.

In an action against an executor or administrator, if the defendant pleads a matter in bar, which lies within his knowledge, and is false, judgment shall be for the debt as well as for damages and costs *de bonis testatoris si, et si non, tunc de bonis propriis*; as, if he pleads *ne unques executor*, and it is found against him. R. 1 Rol. 930. l. 40. 933. l. 28. Off. Ex. 263. Town. Jud. 57. or *ne unques administrator*. Town. Jud. 71. 1 Sand. 217. { *Lausing v. Lansing*, 18 Johns. Rep. 502.

An executor is bound to take notice of a judgment against his testator, and if he exhaust the assets by paying debts of an inferior degree, he shall be liable *de bonis propriis*. *Nimmo's Exr. v. Commonwealth*, 4 Hen. & Munf. 57. }

If an action be against divers executors, and one pleads *ne unques executor*, and the others *plene administravit*, and it is found against them, there shall be judgment against all *de bonis testatoris si, &c. et si non*, who pleaded *ne unques executor, de bonis propriis*. 1 Rol. 932. l. 52.

In an action against several executors, if one appear and the others are returned not found, the plaintiff may proceed against him that appears, and if he re-  
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cover, he shall have judgment against all ; and all must join in a writ of error. Ld. Raym. 870.

One executor pleads a good plea, the other a bad one ; judgment shall be against one executor only. Str. 20.

If an executor pleads *ne unques executor*, and it is found against him, the judgment shall be *de bonis propriis*, though he has neither proved the will nor administered. Off. Ex. 264.

And though he has refused before the ordinary. Dub. Off. Ex. 264.

Otherwise, if an action is brought against the executor of B. who was the executor of C. who pleads B. *ne unques executor*. Qu. 2 Lev. 133.

Otherwise in a *scire facias* against an executor, if he pleads *ne unques executor*, and it is found against him, the judgment shall not be for the debt *de bonis propriis*, for the plaintiff demands execution *de bonis testatoris*. R. 1 Rol. 933. l. 30. R. Lit. 53.

So, if an executor or administrator pleads a release to himself, and it is found against him, the judgment shall be for the whole *si non de bonis propriis*. D. Mo. 70. 2 Cro. 672. Off. Ex. 265.

Or, payment or performance by himself. Off. Ex. 265. Dub. Mo. 70.

So, in all cases on the return of a *devastavit* against an executor, or administrator, there shall be judgment against him for the debt as [\*]well as damages and costs *de bonis testatoris*, *si, &c. et si non, de bonis propriis*. R. 1 Rol. 932. l. 32. 35. R. Mo. 299. Dy. 105. b.

Or, upon a return that the goods are esloined. 1 Rol. 932. l. 30. R. 2 Sand. 403.

And, if there be judgment against husband and wife executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*. 1 Rol. 932. l. 25.

If a return that the wife wasted *dum sola.*, it shall be *de bonis propriis* of both. 1 Rol. 931. l. 5. R. Cro. Car. 519.

And if the first judgment was *de bonis testatoris*, *si, &c. et si non, tunc dampna de bonis propriis* against husband and wife executrix, and afterwards a *devastavit* is found, the judgment shall be against them *de bonis propriis*. R. 1 Rol. 930. l. 50. Cro. Car. 519.

If there be a *devastavit* by one executor only, the judgment shall be of his proper goods. Dy. 210. a. R. Cro. El. 318. ; for the other executor shall not be charged for the wrong of his co-executor.

Yet, if a *devastavit* be charged against two executors, and found *quoad* one, and nothing said *quoad* the other, it is bad. Semb. Skin. 571.

So, where an executor or administrator is charged for his own proper act or default, the judgment shall be for the debt and damages *de bonis testatoris, et si non, de bonis propriis* : as, in *detinue* for a detainer after the testator's death. 1 Rol. 928. l. 37. [Cowp. 289.]

In *assumpsit* by legatee against executor in his own right on a special promise in consideration of assets, judgment shall be *de bonis propriis*. Cowp. 292.

In debt, for rent incurred after the death of the testator. 1 Rol. 931. l. 3.

In covenant for a breach after the death of the testator. R. 1 Sand. 112. R. 2 Cro. 648. Vide post, (2 D 16 )

If an executor acknowledges satisfaction upon a judgment to the testator, which is afterwards reversed, there shall be restitution, *si non, &c. de bonis propriis*. 2 Rol. 400.

And if the act or default of the executor or administrator is the foundation of the action, the judgment shall be *de bonis propriis* only ; as, in *assumpsit* against an executor on his promise upon good consideration to pay the debt of the testator. 1 Rol. 930. l. 15. 9 Co. 93. a. R. 2 Lev. 122. D. 1 Leo. 240. R. Cro. El. 406. Mo. 419. 1 Leo. 94.

In covenant against an executor or administrator, for a breach by him of a covenant in a lease which he has as executor or administrator. R. 1 Sal. 309.

When the judgment is *de bonis propriis*, and upon a *fieri facias*, *nulla bona* is returned, the execution shall be by *capias* or *elegit*. Dy. 185. b.

What shall be a *devastavit*, and how found, vide Administration, (I 1, 2.)

If judgment on verdict is signed after testator's death, a second in debt, on that judgment *de bonis testatoris* ; whereupon error and judgment affirmed ; a third suggesting *devastavit de bonis propriis*, and a fourth on debt on the last, and executor held to bail ; all is regular. Barnes, 248.

### [\*](2 D 16.) When not.

But in all cases where the action is against an executor or administrator, merely as executor or administrator, the debt shall be recovered only *de bonis testatoris*, and the damages, which are for the delay, *de bonis testatoris, et si non, de bonis propriis*. 1 Rol. 928. l. 35. D. 1 Sal. 309. 1 Brownl. 50.

Though the executor or administrator pleads a false plea ; as *plene administravit*, and it is found against him. 1 Rol. 931. l. 27. Off. Ex. 266. Town. Jud. 57.

Or, it is determined against him upon demurrer. Dy. 32. a.

So, if he pleads a judgment, and no assets *ultra*, and it be replied that it was by covin, and found against him. R. 1 Rol. 931. l. 40. 1 And. 150.

So, if he pleads *non est factum testatoris*. 1 Rol. 931. l. 35. Semb. Dy. 32. a. in marg. Off. Ex. 266.

Or, a payment after the testator's death. R. 2 Cro. 191.

Or, in *quare impedit* makes title by a false grant to the testator. 1 Rol. 928. l. 45.

Or, pleads in abatement, another executor not named. 1 Rol. 931. l. 25.

So, if the breach be by the executor himself ; as, if A. covenants to pay 50*l.* if he or his executor sells the land, and the executor sells it. R. 2 Rol. 415.

Though the executor might be charged as assignee as well as executor. Semb. 1 Sal. 317.

So, if an executor or administrator is charged in an action, where the recovery is wholly in damages. 1 Rol. 928. l. 40. and the costs only shall be *si non, &c. de bonis propriis*.

So, in covenant, upon a breach by the testator. R. 1 Rol. 931. l. 45.

So, in covenant against an executor upon the testator's deed, if the breach be alleged in nonfeasance by the executor himself, the judgment shall be *de bonis testatoris tantum* ; as, for not repairing. R. 1 Rol. 932. l. 5. Dy. 324. b. R. Hob. 188. [4 B. M. 2154.]

For not making offer of a presentation. R. 1 Rol. 931. l. 50.

So, in debt upon a bond, for non-performance of covenants. R. 2 Cro. 647. R. Hob. 283.

So, though the breach be for a voluntary neglect, or act of the executor ; for the charge is founded upon the deed of his testator. R. 2 Cro. 671. Adm. 1 Sand. 112. R. Hut. 35.

In all cases where the plaintiff is delayed, though the demand be *de bonis*  
[\*318]



*testatoris*; yet the costs or damages given for the delay shall be *de bonis propriis non*, &c. 1 Rol. 928. l. 35.

Though the executor or administrator suffers judgment against him by *nihil dicit* or *non sum informatus*. Off. Ex. 268. 1 Rol. 933. l. 5. R. 2 Sand. 107. Ash. Ent. 282.

So, if he confesses the action. 1 Rol. 933. l. 10.

So, if he appears at the return of the summons, and pleads in abatement, and on the *respondeas ouster* suffers judgment by *nil dicit*. R. Cro. Car. 519.

[\*]So, if an action be brought against husband and wife, as executrix, or administratrix, the judgment shall be for damages and costs, *si non*, &c. *de bonis propriis* of both. Ibid.

But if an executor or administrator makes no delay or default, the costs or damages as well as the debt shall be *de bonis testatoris tantum*; as, if he at the return of the summons acknowledges the action and says that he has not assets, and it is found so. 1 Rol. 933. l. 15.

If at the return of the summons he pleads, that he was always ready, and yet is. Ibid. l. 20.

If the judgment be *de bonis testatoris*, *si*, &c. *et si non*, *tunc damna de bonis propriis*, the sheriff may not levy the damages *de bonis testatoris*, if he cannot levy the whole debt also *de bonis testatoris*; for the damages in such case shall be of the goods of the executor. R. 1 Lev. 7.

And if the sheriff does otherwise, his return and all proceedings thereon will be bad. Ibid.

The plea of *plene administravit*, goes to the time of suing out the writ, unless plaintiff takes issue on that averment in it, "that the defendant has not received assets since." If he does not, his judgment of assets *quando*, should be in such form as to reach all assets received since the writ sued out. 6 T. R. 1.

After judgment against an executor of assets *quando acciderint*, no assets are liable to the creditor's demand, but such as have come to hand since the judgment; the right of appropriating assets previously received, to other purposes than his own demand, being admitted by the creditor taking such judgment. Therefore, as well for this reason, as because a *scire facias* must always be conformable to the record, on which it is founded, a *scire facias* on such a judgment must pray execution only of assets received since. 6 T. R. 1.

## (2 E 1.) In actions by and against an heir.—In an action by an heir.

In an action by an heir, who sues upon a grant or covenant to his ancestor and his heirs, he must be named heir.

Otherwise, if he sues in his own right, though he comes to the right by descent; as, in detinue of charters, which he claims as heir. Th. D. l. 3. c. 6.

So, he must shew how heir. 1 Sal. 355.

Debt by the heir or successor shall be in the *debet* and *detinet*. 47 Ed. 3. 23. b.

{ In an action by the heir, for breach of covenants in a conveyance of lands to the ancestor, an omission to set forth the manner in which he derived his title, will be aided by verdict. Woodford's heir v. Pendleton, 1 Hen. & Munf. 303. }

## (2 E 2.) In an action against an heir.

In an action against an heir, the defendant must be named heir. Vide Abatement, (F 20.)

But it is sufficient if he is so named in the count, though not in the writ. Reg. 140. a.

And if it be against the heir of an heir, the plaintiff must shew how heir specially, for against him as heir generally to A. if he pleads that he has *riens per descent* from A. it shall be found for the defendant. R. Cro. Car. 151. { But vide Waller's Exrs. v. Ellis, 2 Munf. 88. }

[\*]If it be against an heir in gavelkind, it shall be against all the sons together. Bro. R. 195. Bend. pl. 205.

By the st. 3 & 4 W. & M. 14. an action may be brought against the heir and devisee of the land jointly. Clift. 243.

A devisee of all the devisor's lands, &c. in trust to sell and pay all the devisor's debts, &c. cannot be sued under this statute. Willes, 521. Barnes, 164. S. C.

An action of covenant will lie against an heir on a covenant by which the ancestor bound himself and his heirs. Willes, 585.

In such an action it is not necessary to allege in the declaration that the heir had lands by descent; if he had none, he must plead it. Ibid. { Vide Elting v. Vanderlyn, 4 Johns. Rep. 237. }

So, in an action against an heir on a bond, &c. of his ancestor, the plaintiff must shew that the heir was bound.

So, in an action upon an *assumpsit* to pay the debt of his ancestor. R. 2 Sand. 136. R. cont. 1 Sid. 31.

And the omission shall not be aided after verdict. R. 2 Sand. 136. Ray. 128. 1 Vent. 159.

But it may be amended. Lut. 508.

Debt against an heir on the bond of his ancestor shall be in the *debet* and *detinet*. Pl. Com. 441. a. Dy. 344. b. R. 1 Sid. 342. 2 Leo. 11. R. 1 Lev. 130. R. Jon. 87. Reg. 140. a. { Waller's Exrs. v. Ellis, 2 Munf. 88. }

And if the heir received sufficient out of the land, and died before recovery against him, debt lies against his executor. Semb. Dy. 344. b.

And there is no need to shew in a declaration that the heir had assets; for it shall be intended *prima facie*. Dy. 344. b.

But in an action against an heir, it is sufficient that he is named heir to him who was last seised.

So, if A. tenant for life, remainder to his eldest son in tail, remainder to A. in fee, dies, and the eldest son enters and afterwards dies without issue, debt lies against the youngest son, as heir to A. without naming his elder brother. R. Sho. 248. 3 Lev. 286, 287. 3 Mod. 253.

So, the plaintiff need not shew how the defendant is heir: for it does not lie within his knowledge. R. 1 Sal. 355. { Vide Waller's Exrs. v. Ellis, 2 Munf. 88. }

So, the omission of *debet* shall be aided after verdict. Semb. 1 Sid. 342. R. 2 Mod. Ca. 356.

{ It seems, that *indebitatus assumpsit* for goods sold the ancestor, will not lie against the heir, though the personal estate is insufficient for the payment of debts, and the heir has received lands by descent, more than sufficient. Lodge v. Murray, 1 Har. & Johns. 499. }

## (2 E 8.) Pleas by an heir.

In an action against an heir in the place of his ancestor, if he is within age [\*320]

he may pray that the parol may demur till his full age. Cl. Ass. 401. Vide *Enfant*, (D 1.)—Vide *Assets*, (A—B).

So, in debt against heirs in gavelkind, if one be within age. Ast. Ent. 241. Bro. R. 195.

Or, against parceners. 3 Co. 13. a.

But if all are outlawed, and the others are pardoned, but not the infant, the parol shall not demur for the nonage of the infant. R. Mo. 74. Dy. 239. a. Bend. pl. 205.

And at the full age of the infant there shall be a re-summons against all the co-heirs. Bro. R. 196.

But the heir cannot plead that the executor or administrator has assets. Pl. Com. 439. b. R. Dy. 204. b. 1 And. 7.

[\*]Or, that there is an executor or administrator; for the obligee may sue one or the other. R. 3 Lev. 189. R. Bend. pl. 142.

Or, that there is another action depending against him as executor. R. 3 Lev. 303, 4.

Or, that the plaintiff has recovered part against the executor or administrator. Semb. 3 Lev. 304.

The safest way for the heir is to confess the action, and shew the certainty of the assets descended to him. Pl. Com. 440. a.

Or, if he has no assets, to plead *riens per descent*. Lut. 290. Bro. R. 195.

Or, if he has only a reversion after an estate tail; for he may plead generally, nothing by descent. 3 Lev. 287.

Or, that he has paid debts to more than the value of the lands descended to him. R. on demurrer in C. B. Str. 665.

So, he may plead nothing but a reversion after an estate for life or years. Ast. Ent. 261. Dy. 373. b. Lut. 443.

He may plead nothing but a reversion after an estate for life. Semb. Ld. R. 784.

But cannot plead nothing but a reversion after an estate for years. R. Ld. R. 783.

{ Nor *riens per descent*, except certain lands aliened for a valuable consideration before the commencement of the suit. *Hammond v. Gaither*, 3 Har. & M'Hen. 218. Vide *Hamilton v. Haynes*, Cam. & Nor. 413. }

Or, except such lands and also a reversion. Tho. Ent. 208.

But he cannot plead a recovery of dower by a decree in chancery. R. 1 Sal. 355.

So, an heir may plead a release to himself.

Or, a release to the executor or administrator of the obligor. Co. Lit. 223. a.

Or, a bond by the executor, or administrator, for the same debt. R. 1 Mod. 221. 225. Vide post, (2 W 46.)

Or, retainer for his own debt. Qu. 2 Ver. 62.

To debt by an obligee of his ancestor the heir cannot plead that he has laid out money in repairing the premises and claim to retain on that account. 1 T. R. 454.

If the heir confesses assets, he ought also to confess the action. Semb. Lut. 444.

If he has a reversion, that the lessee entered and the reversion descended. Dub. Lut. 444.

And he cannot pray a delay of execution during the term. R. 1 Sal. 355.

## (2 E 4.) Replication.

To *riens per discent* the plaintiff may reply, assets descended. Ast. Ent. 240. Dy. 344. b. Bro. R. 195.

Or, a writ purchased by journeys accompts, and that he had assets at the purchase of the first writ. Lut. 290, &c.

So, if he pleads, *riens per discent præter* a reversion after an estate tail, the plaintiff may say, that assets descended generally; for *præter*, is idle, and the plaintiff shall answer to the material part only. R. 2 Mod. 50.

So, by the st. 3 & 4 W. & M. 14., the plaintiff may reply that the defendant had assets by descent before the original purchased.

After *riens per discent* pleaded, the plaintiff may pray execution [\*] of assets *cum acciderint*. 8 Co. 134. a. 2 Sand. 226. 1 Sid. 448. 1 Rol. 57.

Or, if *riens per discent præter*, he may pray execution of assets confessed.

Or, reply that the defendant had assets *ultra*. 2 Mod. Int. 222.

And if he replies assets *ultra*, he may waive it, and pray judgment of assets confessed *cum acciderint*. 1 Rol. 57.

And now, by the st. 3 & 4 W. & M. 14. that he had assets before the original purchased, or bill filed, and if it be found so, though the heir has aliened, the plaintiff shall recover against him to the value of the sale, though the alienation made *bona fide* shall be in force.

And such replication shall conclude to the country. Qu. 5 Mod. 123.

And it need not say, to the value of the debt; for the value is not material. Semb. Ibid.

So, the defendant cannot by rejoinder say that he has paid another debt to the value of the assets sold. Qu. Ibid.

## (2 E 5.) Judgment against an heir.

If the heir confesses the action, and shews the certainty of assets, he shall not be charged in person, goods, or other land, except what he had by descent from his ancestor. Pl. Com. 440. a. Town. Jud. 67. 2 Rol. 71. l. 50. 70. l. 35.

If he pleads, *riens præter* a reversion, the plaintiff may take judgment for debt and damages *de reversion. prædict. levand. cum acciderit*. Dy. 373. b.

But, if the heir pleads a false plea, which he knows of his own knowledge to be false, there shall be judgment against him generally, and execution of his own proper lands and goods, and against his body, by *capias ad satisfaciendum*, like as for his own proper debt. Pl. Com. 440. a. 2 Rol. 70. l. 40.

So, if he pleads *riens per discent*, and it is found against him. Pl. Com. 440. a. Dy. 149. a. 2 Leo. 11.

So, if he pleads payment by his ancestor, and it is found against him. R. per three J. Dolb. cont. Sho. 78. Vide infra.

Or, payment by another bond. R. Carth. 93.

Though the assets found are small, and not to the value of the debt.

So, if his plea be falsified in part by a jury of H., though the trial ought to be by a jury of H. and M. Semb. 2 Lev. 178.

So, if the plaintiff shews to the court, that the defendant has received from the death of his ancestor, before the original sued, assets out of the

profits of lands which descended, and the defendant does not deny it. R. 2 Rol. 71. l. 5. Per Dy. 344. b.

If an heir suffer judgment by *nil dicit*, it shall be entered against him generally, and a *fi fa.* may be sued out thereon *de bonis propriis*. C. B. 1. F. 30.

So, if judgment be against the heir by *nil dicit*. Pl. Com. 440. a. Cont. Dy. 81. a. but R. acc. in marg. *ibid.* R. Mo. 522. Cro. El. 692. Vide st. 3 & 4 W. & M. 14. sect. *ante-penult.* Com. Jon. 88. Acc. 2 Rol. 71. l. 45. 70. l. *ult.* Cont. Poph. 255.

Or, by *non sum informatus*. Pl. Com. 440. a. Cont. Dy. 81. in [\*]marg. Acc. Dy. 344. b. Cont. Jon. 88. Acc. 2 Rol. 71. l. 45. 70. l. 50.

Or, by confession. Pl. Com. 440. a. if he does not also shew the certainty of the assets. Dy. 344. b. Vide st. 3 & 4 W. & M. 14. Cont. Jon. 88. Acc. 2 Rol. 71. l. 45. 70. l. 45.

So, if judgment be against the heir upon demurrer. Pl. Com. 440. b. Per st. 3 & 4 W. & M. 14.

R. Ld. Raym. 783. Unless the plaintiff will assent to take a special judgment. Ld. Raym. 786.

Or, by any other means except confession and shewing the certainty of the assets. Pl. Com. 440. a.

By the st. 3 & 4 W. & M. 14., a devisee of land, who is suable with the heir by that statute, shall be liable for a false plea by him pleaded in the same manner as the heir should have been for a false plea, or not confessing the assets descended.

But if there be judgment against the heir upon a false plea, as for his proper debt, it shall be only of a moiety of all his lands. R. Jon. 87.

So, in *scire facias* against an heir; for he is charged as *tertenant*. Cro. Car. 296. 313.

And the plaintiff shall have his election to take judgment against him, as for his proper debt of the moiety, or to take judgment of all the lands which he has by descent. R. Jon. 88. 2 Rol. 71. l. *ult.* & l. 10. D. Poph. 155.

Yet, if he takes judgment for the lands which descended, it will be error, if it does not appear to be by the plaintiff's assent. R. 2 Rol. 71. l. 20.

Though it is found by the jury, who find the issue, or by writ of inquiry, that he has lands by descent. R. 2 Rol. 71. l. 30.

Yet, in a *scire facias* upon a judgment or recognizance against an heir, if he pleads a false plea, the judgment shall be special against him for assets which descended. Dy. 81. a. in marg. R. Jon. 87. Carth. 93. Vide *supra*.

So, in debt against an heir upon a deed of his ancestor, who pleads *non est factum*, and it is found false, the judgment shall be only for assets which descended; for it was not false in his own knowledge. R. Cro. Car. 437.

So, in annuity against the heir on his ancestor's grant, who pleads *non est factum*, and it is found against him, the plaintiff may have judgment for assets which descended. R. 2 Rol. 71. l. 15.

So, by the st. 29 Car. 2, 3., (which makes a trust in fee-simple, and also an estate *pur auter vie*, which comes to the heir as a special occupant, as sets in the hand of the heir) no heir, who becomes chargeable by that act, shall, by reason of any kind of plea, confession, or *nient dedire*, be chargeable to pay out of his own estate.

So, by the st. 3 & 4 W. & M. 14., if the defendant pleads *riens per discent* the day of the original or bill filed, the plaintiff may reply, assets before the original; and if it is found for the plaintiff, the jury shall inquire of the value of the lands descended, and thereupon judgment and execution shall be awarded.



## [\*](2 E 6.) Execution.

Execution shall be against the heir for the whole of the land descended. 3 Co. 12. a. Pl. Com. 441. a. Semb. Dy. 81. a. Jon. 87. 2 Rol. 71. l. 50.

And, if land descends to the eldest son, and other land, being of the nature of borough-english, descends to the youngest, the whole shall be taken in execution. Jon. 88.

So, if land descends as well on the part of the mother as on the part of the father, the whole shall be taken. 3 Co. 14. a. Jon. 88.

So, if land descends to parceners, the whole shall be taken.

So, if land of the nature of *gavelkind* descends. Jon. 88.

And if execution be sued against one son or daughter only, it may be avoided by *scire facias* or *audita querela*; for all the heirs ought to be contributory. 3 Co. 13.

If there be an action against an heir by A. and afterwards another action by B., who has judgment first, he shall have execution prior to A., though he obtained judgment afterwards. 1 Mcd. 253.

If there be an action against an heir, and judgment thereon, the execution shall be of the land in his hands, which descended, though he has paid to other creditors to the value of the land in his hands. Kelw. 63. b.

But if there be judgment against the ancestor, who afterwards aliens part, and dies, and execution be sued against the heir only, it is well; for he shall not have contribution against the alienee. R. 3 Co. 12. b.

So, if there be judgment against an heir on *nil dicit*, the plaintiff shall not have a *capias ad satisfaciendum* against him; for it is not his proper debt. Dy. 81. a. R. cont. Cro. El. 692.

So, if the judgment be against him on *non sum informatus*. Dy. 81. a. in marg.

What lands are assets in the hands of the heir, vide Assets, (A).

## (2 F 1.) In action by and against an assignee:—In an action by an assignee.

In an action by an assignee the plaintiff must shew how assignee.

If he sues for rent upon a lease by another, he must shew a legal estate or title to it. R. Cro. El. 535.

But if he shews an assignment, it is sufficient; though he does not name himself assignee. R. 2 Cro. 240. R. per three J. Cro. El. 823.

So, if an assignment be by husband and wife, where they were seised to them and to the heirs of the husband, it is sufficient to declare as assignee of the husband; for the estate for life of the wife is merged. R. Cro. Car. 285. Jon. 305.

## [\*](2 F 2.) In an action against an assignee.

In debt for rent against the devisee of the lessee, the plaintiff must shew an entry by the assent of the executor, or *virtute legationis*. Cro. L. 535.

But it is sufficient to charge the defendant as assignee of B., to whom the lease is made by which he covenants to repair; though he be only executor, or administrator, to such assignee. R. Carth. 519.

As to proceedings and pleadings in account, vide Accompt, (E 1, &c.)

[\*324] [\*325]

(2 G) PLEADING IN ASSUMPSIT ; WHAT PLEAS GOOD.

(2 G 1.) *Non assumpsit, &c.*

As to a declaration in *assumpsit*, vide Action upon the Case upon Assumpsit, (H 2, &c.)

Pleas in *assumpsit* are, 1st. *Non assumpsit*, of which vide Action upon the Case upon Assumpsit, (H 5.)

2d. *Non assumpsit infra sex annos*. Of which, and replications thereto, vide Action upon the Case upon Assumpsit, (H 6, 7.)

3d. Another promise with a traverse of the promise in the declaration : but this is a bad plea, for it amounts only to the general issue *non assumpsit*. R. 2 Rol. 350. Vide ante, (E 14.)

{ What may be given in evidence under the general issue of *non assumpsit*.

1. *Infancy*. *Wailing v. Toll*, 9 Johns. Rep. 141. *Stansbury v. Marks*, 4 Dall. 130.

2. *Joinder of improper parties*. *Tom v. Goodrich*, 2 Johns. Rep. 213.

3. *Payment*. *Drake v. Drake*, 11 Johns. Rep. 531.

4. *Fraud*. *Sill v. Rood*, 15 Johns. Rep. 230.

5. *Other matters of defence*. *Runyan v. Nichols*, 11 Johns. Rep. 547. *Bayley v. Taber*, 5 Mass. Rep. 286. *Baylies v. Fettiplace*, 7 Mass. Rep. 325. }

(2 G 2.) *Tender*.

So, the defendant may plead matter in excuse or discharge : as, before a general imparlance, he may plead a tender, and always ready. Lut. 226. 238. Clift. 203.

To a plea of tender plaintiff replied a demand and refusal before suing out the writ ; rejoinder that before suing out the writ he tendered, &c. traversing that at any time after the tender and before suing out the writ the plaintiff requested him to pay, &c. The rejoinder was holden bad on demurrer. Willes, 632.

In a plea of tender defendant must say he was always ready to pay ; ready from the time of the tender is not sufficient. Ibid.

A tender of bank notes is good, unless specially objected to on that account, at the time. 3 T. R. 584.

Bank notes are not made a legal tender by the stat. 37 Geo. 3. c. 45. 2 Bos. & Pull. 526.

If A. B. and C. have a joint demand, and C. a separate demand on D., and D. offer to A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A. B. and C. 3 T. R. 683.

If the tender is one day after the day of payment in a promissory note, it is not good. Fort. 376.

After an imparlance had by executor, he shall not plead tender by the testator, and that testator and executor were and are always ready to pay. Fort. 376.

After general imparlance, leave to plead tender may be in the first four days of next term. Barnes, 343. 354.

[\*]On want of time for the post, declaration delivered late, defendant may have leave to plead tender after the four days. Barnes, 351. 353. 357. 361, 362.

So, if plaintiff amends his declaration, defendant may have leave to plead

tender as of last term, or that plaintiff accept his tender of the present. Barnes, 359.

Tender cannot be pleaded after rule for time. Barnes, 337.

When and how this must be pleaded, vide post, (2 W 28.)

So, *non assumpsit* to part, and tender of the residue. Cl. Ass. 104. Clift. 202.

Defendant cannot plead *non assumpsit* to all, and a tender as to part. 3 Wils. 145: 4 T. R. 194.

To a tender after imparlance the plaintiff may plead that as an estoppel. Clift. 203.

Or, he may demur. Lut. 227. 239.

If tender *ante diem exhibitionis billæ* is pleaded, plaintiff shall not make up the book with the general memorandum, referring to the first day of term, which was before the tender, but with a special memorandum, according to the fact. Str. 638.

If tender is pleaded, the *placita* is no evidence, but an original must be produced. Barnes, 165.

It is no answer to such a plea that the plaintiff had before the tender retained an attorney, and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied for such writ before the tender which was afterwards sued out. 8 Tr. 629.

{ The tender of a smaller sum than the amount of the debt, as stated in the declaration, computing interest at a given rate, is sufficient, where the plaintiff replies new matter, and does not traverse the sufficiency of the tender. Vermont Bank v. Porter, 5 Day, 316. } •

### (2 G 3.) Within age.

Within age. Lut. 240.

When and how it must be pleaded, and replications thereto, Vide post, (2 W 22.)—ante, (2 C 2.)

He cannot plead, within age, and traverse the promise. R. Jon. 146.

### (2 G 4.) Outlawry.

So, to an *indebitatus assumpsit*, where the ground of the action is forfeited by outlawry, it may be pleaded in bar, that the plaintiff is outlawed. Co. Lit. 128. b. 3 Lev. 29. Lut. 1512.

So, in a *quantum meruit*, though the demand be not reduced to a certainty. R. 2 Vent. 282. Lut. 1514.

So, in *assumpsit*, upon a bill of exchange. R. 3 Lev. 29.

How it shall be pleaded in abatement, vide Abatement, (E 2.)

How in bar, vide post, (2 W 24.)

If it be pleaded in bar, and the outlawry be reversed before the day for bringing in the record, there shall be only a *respondeas ouster*. R. Yel. 36. 2 Cro. 484.

Otherwise, if he fails to bring in the record upon the day, when there was no reversal, for then there shall be final judgment. R. Cro. Car. 568.

### [\*](2 G 5.) Foreign Attachment.

So, to an *assumpsit* the defendant may plead a recovery by a foreign attachment on a plaint entered before the original or bill filed. Lev. Ent. 2.

{ Vide Perkins v. Parker, 1 Mass. Rep. 117. }

[\*327]

And to an *indebitatus assumpsit* it shall be given in evidence upon *non assumpsit*. Lut. 995.

If the plaint was entered before the original filed. Per Trevor, 1 Sal. 291. Per Holt, if there was a condemnation before the original. 1 Sal. 280.

The defendant must shew that plaintiff in foreign attachment swore his debt. Str. 641. Vide 3 East, 379.

When and how it shall be pleaded, vide Attachment, (H—I.)

The plaintiff may reply to it that the debt arose out of the jurisdiction. Lev. Ent. 10. R. 3 Lev. 23.

Or, may traverse the custom.

Or, demur.

### (2 G 6.) Composition.

So, the defendant may plead a composition with his creditors according to the statute. Lut. 266. Clift. 156. [This statute has been repealed.]

And it ought to conclude, as it was a release. Lut. 271. for it is in the nature of a defeasance. Per Holt, (Com. 112.)

And in pleading, it is sufficient to pursue the words of the statute. R. (Com. 112.)

And there is no need of a *profert hic in cur*. R. Mod. Ca. 58. (Com. 112.)

It is sufficient, if it be for the equal benefit of all the creditors, though it be not so mentioned in the composition. (Com. 112.)

If he shews that he was insolvent; for it shall be intended that he continued so, if the contrary does not appear. R. Mod. Ca. 58.

But he must shew that he was insolvent at the beginning of the sessions. Mod. Ca. 156.

But, to an action brought by one of the creditors of a debtor to recover his whole demand, the debtor cannot plead an agreement between him and his creditors that they would accept a composition, in satisfaction of their respective debts, to be paid in a reasonable time. 2 T. R. 24.

An agreement, (semble, not under seal, 1 B. & P. 289. 11 East, 390.); between a debtor and his creditor, to give and accept so much in the pound, is binding on any creditor. 2 T. R. 24.; though followed up by acceptance. 5 East, 280. 1 Smith, 1415.; unless payment is guaranteed by a third person, or the agreement is founded on some other sufficient consideration, such as the assignment of the debtor's effects, in trust to secure payment, 2 T. R. supra, when it will be binding, though the guarantee is for part only, and the agreement not under seal. 11 East, 390.

A creditor is not bound by a composition deed to which he is party, if any misrepresentation has been practised to obtain his consent. 6 T. R. 263.

Where a party obliged, is to be discharged from his obligation by performance of an act, it is for him to perform the act which is to discharge him, without waiting until performance is demanded. A debtor and his creditors execute an agreement to compound his debts for 8s. in the pound, payable at fixed days. The payments are to be secured by promissory notes, [\*] to be given to each creditor by the debtor, and he is to assign to the creditors certain debts owing to him from three persons, upon which the creditors were to execute a general release. The debtor makes the assignment. One creditor never applies for his notes, which are ready for him, but the debtor does not go and offer them. Held, that such creditor might after the day of payment, sue for the original debt. 2 M. & S. 120.

Where a debtor is discharged by compounding with his creditors, and the agree-

(2 G 11.) *Insimul computaverunt.*

So, to an *assumpsit*, the defendant may plead that, since the promise made, he and the plaintiff *insimul computaverunt, et super compot. ill. ipse inventus fuit* in arrear, so much, which he has paid. Bro. V. M. 94. 100. Vide Action on the Case upon Assumpsit, (G.)

Or, he may tender the arrears found on the account in court. 2 Mod. Int. 144.

But an account without payment or release is no plea to an *indebitatus assumpsit*. R. 3 Lev. 238. ; for a chose in action cannot discharge a matter executed.

So, *insimul comput.* and payment amount to the general issue.

On account stated between merchant and merchant, the balance carries interest from the time it is liquidated. 3 Wils. 205.

## (2 G 12.) Bond for the money.

So, to an *assumpsit* the defendant may plead a bond given by him for the money demanded. Cl. Ass. 117. Clift. 199. For the bond determines the contract. Cro. Car. 415. 2 Cro. 33. 234. Vide post, (2 W 46.)

Or, that all the counts are for the same sum, and he has paid part, and given a bond for the residue. Ray. 449. 2 Jon. 158.

So, he may give it evidence upon *non assumpsit*. Per Holt. 5 An.

And if it be pleaded, it is bad ; for it amounts to the general issue. R. Cro. El. 201. Semb. 5 Mod. 314. Vide ante, (E 14.)

## (2 G 13.) Discharge from the promise.

So, the defendant may plead that the plaintiff, before the breach, discharged him from the promise. Clift. 199.

When a promise may be discharged or not, vide Action on the Case upon Assumpsit, (G).

## (2 G 14.) A release.

So, he may plead a release after the promise. Cl. Ass. 258.

A release to such a day *absque hoc quod assumpsit post*. Bro. V. M. 98.

[\*]But a release upon performance of the promise in part *quoad hoc* does not discharge the promise for the residue. R. 2 Rol. 413. l. 20. Vide post, (2 W 30.)

## (2 G 15.) Performance.

So, to an *assumpsit* the defendant may plead a special performance.

If the defendant pleads payment, he must shew in certain what sum he paid. R. Mar. pl. 120. Vide Dan. 77. Vide ante, (E 5.)

But a sum given in satisfaction after the day of payment is no good plea. R. 4 Mod. 250.

But if the defendant pleads a special performance ; as payment, &c. upon an *indebitatus assumpsit*, it is bad ; for this amounts to the general issue only ; yet he may plead it, for it admits a promise. R. 1 Sal. 394.

So, if he pleads that by agreement with the plaintiff he paid to A. 1 Mod. 7.

That he performed all on his part to be performed. R. 1 Sal. 394.

Or, another promise, and traverses the *assumpsit modo et forma*. R. 2 Rol. 350.

[\*331]



**(2 G 16.) Discharge upon statute for insolvent debtors.—Vide Imprisonment, (M 1.)**

So, the defendant may plead in discharge of an execution against his body, &c. a discharge according to the statute for the relief of insolvent debtors. Sal. 521. Lev. Ent. 65.

And if the plaintiff demurs to it, he shall have judgment, but no execution against his body ; for the demurrer confesses the discharge. R. 2 Jon. 165.

So, the plaintiff may take his judgment immediately. Clift. 156.

But he shall not be discharged, if the defendant was indebted above the sum of 500*l.* by the st. 30 Car. 2. at the time of his discharge ; though he was not in execution for it 29 May, 30 Car. 2. R. 2 Jon. 208.

So, it is no plea if it does not shew all things done which entitle the justices to jurisdiction. R. Sal. 521. 3 Lev. 151. Per Holt. Skin. 362.

In pleading a judgment of a court of limited jurisdiction it is necessary to state those facts that give the court a jurisdiction, and having stated those, the party may allege generally that the court gave such a judgment. Willes, 199.

The insolvent act 10 Geo. 2. gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time ; and it was holden that in pleading a discharge by the court of sessions it was necessary to allege that the party was in prison or had surrendered himself before that time. Ibid.

Saying that "he was duly discharged by the court of quarter sessions from his imprisonment aforesaid," is not alone sufficient. Ibid.

If A. indebted to B. by simple contract, becomes a fugitive ; insolvent act passes ; A. returns, and five months after is arrested for this debt, lies five months in prison, and then gives bond for the debt, and afterwards surrenders, [\*]and is discharged by the insolvent act, he shall not plead it against the bond ; for he ought to have surrendered in reasonable time before he was arrested, or when arrested, have brought *hab. cor.* and been surrendered. R. on demurrer. 2 Wils. 332.

A promise to waive the benefit of an act for insolvent debtors, and pay the debt on request, will revive a debt barred by that act ; but the request must be made before the action brought. 2 Bl. 724.

**(2 G 17.) Statutes of set-off.**

It is enacted by the st. 2 Geo. 2. c. 22. s. 13., "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case may require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

If a creditor purchase goods of his debtor, to be paid for in ready money, the creditor may nevertheless set off his demand against an action for the price. 1 East, 375. 2 Esp. 626. 16 East, 138.

A verdict against a plaintiff, in a prior action, may be set off against a present demand. 2 Burr. 1229.

A judgment may be pleaded by way of set-off pending a writ of error. 3 T. R. 186.

Unliquidated damages are not the subject of a set-off. 6 T. R. 488.

In covenant, unliquidated damages arising from the breach of other covenants by the plaintiff, cannot be set-off. Cowp. 56.

A debt due from the plaintiff and another, jointly and severally, may be set-off. *Secus*, if jointly only. 2 T. R. 32.

The debt and costs in a joint action by A. against B. and C., may be set-off against those recovered in an action by B. and C. against A., notwithstanding A. has a separate demand against C. 8 T. R. 69.

The costs of one judgment may be set-off against the debt and cost of another. 2 Blk. 826.

The court will permit the costs of one action to be set-off against those of another (even where the one is a several, the other a joint action), the party applying undertaking to satisfy the attorney's lien for his bill in the cause, to the costs of which he is chargeable, and to enter a *remititur* in that in which he is entitled to costs. 4 T. R. 123. 2 H. B. 441.

Semble, the defendant cannot set-off the debt and costs against a judgment recovered against the plaintiff, if the plaintiff has still another demand against him. 8 T. R. 69.

It seems that the court will not permit one judgment to be set-off against another on motion, unless the same might be done by plea in an action thereon. 3 East, 149.

The court will not allow one judgment to be set-off against another, on motion where the interests of third persons have intervened; not, therefore, a judgment recovered by A. from B. when solvent, against one recovered from A. by the assignees of B. since his insolvency. 3 East, 149.

The defendant may set-off a judgment recovered from the plaintiff against the demand for which he is suing, and the costs incurred, though the plaintiff is in execution on the judgment, since that is no satisfaction. 1 Taunt. 426. 1 M. & S. 696.

[\*]Where several actions were brought upon two policies of insurance, underwritten by the same parties, and the actions on each were respectively consolidated, after which the plaintiff, in one of the consolidated causes, became entitled to costs, and in the other the defendant; the court directed the costs, taxed and allowed to the defendant to be set-off against those taxed, and allowed to the plaintiff, although the same underwriter was not a defendant in both actions. 1 H. Blk. 217.

If A., equitably entitled to the costs of a nonsuit in an action by B. against C., and liable to pay the costs of a nonsuit in an action by himself, (A.) against B.; the costs of the nonsuit in the action by B. against C., may be set-off against the costs of the nonsuit in the action by A. against B. 1 H. Bl. 657.

Costs taxed upon an interlocutory order made in an inferior court in the course of a suit there, may be set-off. 2 H. Bl. 248.

Where the plaintiff sued out execution against the defendant, an uncertificated bankrupt, notwithstanding the allowance of a writ of error, which execution was set aside on the ground of irregularity, with costs, the court refused to permit the amount of those costs to be set-off against the costs of the action. 1 N. R. 311.

Motion to set-off costs in a suit in C. B., for which the plaintiff here (in the exchequer) had retained the defendant as the attorney, (though he himself was not the party), against the judgment here, was granted. 1 Anst. 271.

The court will not, in a summary way, enable a prisoner to set-off a debt from the plaintiff, against the execution under which he is taken. 6 Taunt. 176.

A plaintiff will not be allowed to pay into court a cross demand for which the defendant is suing him, to go in reduction of the damages that he shall recover from the defendant. 3 Taunt. 525.

Where a debt due from the vendor to the vendee is to be taken in part payment, it need not be set-off in an action for the price. 12 East, 1.

The court cannot apply a fine estreated in payment of the expenses of prosecution. 2 Anst. 523.

[\*333]

Two parts of a plea of a set-off, are as two counts in a declaration, and if one part be good, a general demurrer to the whole is bad. 2 Blk. 910.

There is no compulsion upon a defendant, to make a set-off, and if he pleases he may bring a cross action. 2 Smith, 668. 4 Camb. 134.

A replication to a plea of set-off, comprising two debts—one of record, the other a simple contract debt, protesting that the plaintiff owes the debt of record, that he is not indebted *modo et forma*, and concluding to the country, seems bad. 1 East, 369.

The statute of limitations may be replied to a plea of set-off. Str. 1271.

It is enacted by stat. 5 Geo. 2. c. 30. s. 28. (an act to prevent the committing of frauds by bankrupts), "that where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."

Mutual credit, *ex vi termini*, imports unliquidated damages, as contradistinguished from mutual debts; therefore, unless in the case of bankruptcy, [\*]unliquidated losses on policies of insurance, cannot be set-off. 1 M. & S. 494.

And debts deemed in law of a different nature may be set against each other, "unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set-off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." Stat. 8 Geo. 2. c. 24. s. 5.

Under the st. 8 G. 2., no debt on bond can be set-off, unless it be on a bond for securing the payment of money. Willes, 261.

A bail bond cannot be set-off. Willes, 261.

Nor can such a bond (given to an officer of the palace court) be set-off under the st. 2 G. 2. to an action brought against that officer on simple contract. Willes, 261.

A bail bond assigned over by the sheriff to the party, may be set-off to an action brought by that party. Willes, 261.

In pleading a set-off to debt on bond, or in setting off a debt due on bond, the sum averred to be due upon the bond is material, and therefore traversable; and if not traversed, is admitted. 3 T. R. 65.

A material and definite averment is not rendered immaterial and indefinite, by being laid under a *videlicet*. Therefore since in a set-off to debt on bond, it is necessary under stat. 8 Geo. 2. c. 24. s. 5., to set forth what is really due on the bond, the sum stated, though under a *videlicet*, is traversable. 6 T. R. 460.

Debt on bond. The plea, without craving *oyer* of the bond, and stating what was justly due thereon, pleaded a set-off to the supposed promises in declaration mentioned; treating the action as an action of *assumpsit*. Held, that the plaintiff might treat the plea as a nullity, and sign judgment. 2 M. & S. 606.

< Where the maker of a promissory note, promised the assignee to pay it, he cannot, in a suit in the name of the payee, set off demands existing against the nominal plaintiff, prior to the making of the note. Gould v. Chase, 16 Johns. Rep. 226. >

## (2 H) PLEADING IN AN ACTION FOR A DECEIPT.

As to the original and declaration in an action for deceit, or in an action upon the case in the nature of deceit, vide Action upon the Case for Deceit, (F 1, &c.)

To this action the defendant generally shall plead not guilty. Pal. 393.

And he may plead not guilty to an action for deceit in levying a fine in C. B. of land in antient demesne, whereby it becomes frank-fee, though matter of record is mixt with matter of fact. R. Tr. 10 An. in C. B.

## (2 I) PLEADING IN TROVER.

As to a declaration in trover, vide Action upon the Case upon Trover, (G 1, &c.)

The defendant can plead nothing but not guilty, or a release. Vide ibidem. { Vide Smith v. Rutherford, 2 Serg. & Rawle, 358. }

Not guilty *infra sex annos*. Lut. 99.

{ In trover, under the general issue the defendant may shew in justification, a right of entry for rent arrear, under which he entered and distrained. Kline v. Husted, 3 Caines' Rep. 275.

So, he shew a title in a stranger. Schermerhorn v. Van Volkenburgh, 11 Johns. Rep. 529. Vide Kennedy v. Strong, 14 Johns. Rep. 128. Rotan v. Fletcher, 15 Johns. Rep. 207. Laspeyre v. M'Farlane, 2 Tay. 187.

So, he may shew title in himself, as administrator. Hostler v. Skull, 1 Tay. 152. }

## [\*](2 K.) PLEADING IN CONSPIRACY.

## (2 K.) In conspiracy.

As to the original and declaration in conspiracy, or action upon the case in the nature of a conspiracy, vide Action upon the Case for Conspiracy, (C 1, &c.)

To this action the defendant shall generally plead not guilty.

Antiently it was usual for the defendants to plead a justification specially, shewing the grounds of the prosecution. 3 Bul. 284. 2 Cro. 193.

But it is not so safe, because it is tantamount to the general issue. R. that such special matter may be pleaded, for it is not safe to send it to Lay Gens. 20 H. 7. 11. b. R. 2 Cro. 131.

{ A conspiracy to commit a felony, if the felony be committed in pursuance of the conspiracy, cannot be punished as a distinct offence, because the misdemeanor is merged in the felony. Commonwealth v. Kingsbury & al. 5 Mass. Rep. 106. }

## (2 L) PLEADING IN AN ACTION FOR DEFAMATION.

## (2 L 1.) Declaration.

As to declaration in *scandalum magnatum*, vide Action on the Case for Defamation, (B 3.)

For slander of title, vide Action on the Case for Defamation, (C 1, &c.)

As to a declaration for slander against a common person, vide Action upon the Case for Defamation, (G 1, &c.)

[\*335]

Although the publication of a libel must be stated in a declaration, yet it may be collected from the whole of it, and needs not any technical words. 2 Blk. 1037.

The use of the words "of and concerning," in an action or indictment for a libel, is to connect the party libelled with the libellous matter. The innuendoes being merely explanatory, cannot do this. 4 M. & S. 169. < Vide Gilbert v. Field, 3 Caines' Rep. 329. Van Vechten v. Hopkins, 5 Johns. Rep. 211. Thomas v. Croswell, 7 Johns. Rep. 264. Lindsey v. Smith, 7 Johns. Rep. 359. Boonman v. Boyer, 3 Binn. 517. Shaffer v. Kintzer, 1 Binn. 537. M'Clurg v. Ross, 5 Binn. 218. >

A declaration, stating that the defendant published of the plaintiff a false and malicious libel, purporting thereby that the plaintiff's beer was of a bad quality, and deficient in measure, whereby he was injured in his credit and business, is bad. 1 Mars. 522. 6 Taunt. 189. < Vide Ward v. Clark, 2 Johns. Rep. 10. >

In an indictment or action for a libel published in a foreign language, it must be set forth in the original. 6 T. R. 162.

An allegation that a libel was printed by the defendant's authority, imports that it was printed by a third person. 14 East, 1.

< If one of two counts in a declaration for a libel, is bad, and entire damages be given, the judgment will be erroneous. Cheetham v. Tillotson, 5 Johns. Rep. 430. Vide Kennedy v. Lowry, 1 Binn. 397. Bloom v. Bloom, 5 Serg. & Rawle, 393. But vide cont. Hogg v. Wilson, 1 Nott & M'Cord, 216. Neilson v. Emerson, 2 Bay, 439.

In a declaration for a libel, matters suggested by way of inducement, need not be proved. Coleman v. Southwick, 9 Johns. Rep. 45. Eastland v. Caldwell, 2 Bibb, 24. >

### (2 L 2.) Plea.—Not guilty.

To an action for defamation the defendant shall plead not guilty. Lut. 1291.

The general issue is proper in a suit for defamation of title, where the defence is a claim of title. 3 Taunt. 246.

Or, may make a special justification.

The defendant shall plead not guilty, if he did not speak the words in the declaration.

Or, spoke them in a course of justice, or in a manner not malicious. 2 Cro. 91. Poph. 69.

[\*]On not guilty pleaded, the truth of the words shall not be allowed to be given in evidence, in mitigation of damages; it shall be pleaded, that plaintiff may be prepared to defend himself. This was resolved on at a meeting of all the judges. Str. 1200. < Vide Van Ankin v. Westfall, 14 Johns. Rep. 233. Maybee v. Avery, 18 Johns. Rep. 352. Van Ness v. Hamilton, 19 Johns. Rep. 349. Bailey v. Hyde, 3 Conn. Rep. 463. Treat v. Browning, 4 Conn. Rep. 408. Grant v. Hover, 6 Munf. 13. Eastland v. Caldwell, 2 Bibb, 24.

But, on the general issue, the defendant may prove, in mitigation of damages, facts and circumstances, affording a ground of suspicion that the plaintiff was guilty of the misconduct imputed to him, in order to diminish the presumption of the defendant's malice; which if pleaded, would not have amounted to a justification. Bailey v. Hyde, *ut supra*. Commonwealth v. Clap, 4 Mass. Rep. 163. Vide Larned v. Buffinton, 3 Mass. Rep. 546. Wolcott v. Hall, 6 Mass. Rep. 514. Williams v. Mayer, cited 1 Binn. 92. *in nota*. Cheatwood v. Mayo, 5 Munf. 16. M'Alexander v. Harris, 6 Munf. 465. Buford v. M'Luny, 1 Nott & M'Cord, 268.

Whether the general character of the plaintiff, in an action of slander, can be given in evidence, in mitigation of damages? vide Grant v. Hover, 6 Munf. 13. Sawyer v. Eifert, 2 Nott & M'Cord, 511. Buford v. M'Luny, 1 Nott & M'Cord, 268. Calloway v. Middleton, 2 Marsh. 372.

So, the plaintiff may give evidence of his rank and condition in life, to aggravate



the damages; and the defendant may avail himself of such evidence, in mitigation of damages. *Larned v. Buffinton*, 3 Mass. Rep. 546.

Other words than those laid in the declaration, may be given in evidence, in proof of malice. *Wallis v. Mease*, 3 Binn. 550. *Kean v. M'Laughlin*, 2 Serg. & Rawle, 469. *Shock v. M'Chesney*, 2 Yeates, 473. }

Where the words amount to treason or felony, defendant cannot on general issue prove the truth in mitigation. *Barnes*, 195. *Pr. Reg.* 383. (Com. 551.) *Wilkes*, Rep. 20. S. C.

So, the defendant may plead the statute of limitations.

Within age. Cont. if he was seventeen. *Noy*, 129.

So, he may plead that the plaintiff did not take the oath mentioned in the declaration. *Semb. Cro. El.* 169.

### (2 L 3.) In justification.—When allowed.

But if the defendant can justify the truth of the words, he shall not plead not guilty, but must plead a special justification: but this admits the words, and aids uncertainty in alleging them. *Jon.* 307.

{ And if he fail to establish the justification, malice will be inferred. *Jackson v. Stetson*, 15 Mass. Rep. 48. }

And there may be an implied justification of a libel or of slander from the occasion, (as if read in a judicial proceeding,) as well as on account of the subject. 1 *T. R.* 110.

So, if he can confess the words, and by special matter shew them not actionable, he shall not be put to the general issue. 4 *Co.* 14. a. *Poph.* 67.

And therefore, if the words were spoken in another sense, the defendant may plead it specially. *R.* 4 *Cro.* 14. a.

So, if spoken in a court of justice as counsel. *R.* 2 *Cro.* 90. } *Vide Hardin v. Cumstock*, 2 *Marsh.* 481. *Bunton v. Worley*, 4 *Bibb.* 38.

So, if spoken by a member of a legislative body, in the performance of his public duties. *Coffin v. Coffin*, 4 *Mass Rep.* 1.

So, accusation preferred to the chief magistrate, of a state against the character of publick affairs of his appointment, are so far of the nature of judicial proceedings, that the accuser is not bound to prove the truth of them; and is excusable unless the accusation originated in malice, &c. *Gray v. Pettland*, 2 *Serg. & Rawle*, 23. }

The defendant may justify words in *scandalum magnatum*, as well as in an action by a common person. *R.* 4 *Co.* 13, 14. *Kelw.* 26. *R.* *Poph.* 66.

But it is no justification for the speaking, that there was a common fame that the plaintiff was guilty. *Dan.* 163.

That he was a bankrupt, without averment that he continued so. *R.* 2 *Cro.* 579.

{ So, it is no justification for a libel, that the plaintiff had previously defamed the defendant, and that the defendant published the words in his own defence. *Walker v. Winn*, 8 *Mass. Rep.* 248. *Vide Thompson v. Boyd*, 1 *Rep. Con. Ct.* 80.

Whether the insanity of the defendant, at the time of uttering defamatory words, can be a justification? *Vide Dickinson v. Barber*, 9 *Mass. Rep.* 225. }

### (2 L 4.) Replication to it.

To the justification, the plaintiff by replication shall say generally *de injuria sua propria*, &c. 1 *Sand.* 244.

Or, he may say, that after the crime of which he was accused, and before speaking, he was pardoned. Dan. 163. R. Mod. 863. 872.

**(2 L 5.) How justification shall be pleaded.**

The justification is not good, if the defendant does not confess the speaking of the words alleged; as, if the declaration is for saying you stole my cloth and half a yard of velvet; justification, that the plaintiff being a tailor, had velvet delivered him to make a coat, which he made too little, *ratione cujus* he said, you stole part of my velvet, is not good; for it does not confess any words; though it traverses the words alleged. R. Cro. El. 239.

So, if the declaration alleges an accusation of returning on a commission [\*] the examination of divers not sworn, it is no justification that he returned one. R. Cro. El. 623.

If the declaration be for saying, you are a thief, and stole 20*l.*, it is no justification that he stole a hen. R. 2 Cro. 676.

If the justification be upon a presentment at a leet, he must shew the matter to be within the jurisdiction. R. Cro. El. 492.

And that the plaintiff knew the presentment false. R. Cro. El. 492.

So, the justification is not good, if the words with the circumstances by which he justifies are actionable. R. 1 Brownl. 5.

If the defendant says that the plaintiff was found guilty of perjury by verdict, &c. if he does not shew judgment thereon. R. 1 Brownl. 11.

Where the slander of professional character, is a charge of general misconduct, a plea in justification must specify the particular instances. 1 Taunt. 543.

In justifying, in an action for defamation of title, under the authority of adventurers, the plea must state their names and relation to the property. 1 M. & S. 304.

A justification to a charge of swindling, must specify the particular acts of fraud upon which the defendant founds his accusation, that the plaintiff may know what he will be called upon to disprove, otherwise he must come to trial prepared to justify the whole life. 1 T. R. 748.

Where the plaintiff declared against the defendant for publishing a libel, in an account of a trial, imputing to him the crime of perjury and judicial delinquency, in his character of clerk of the court of requests at Liverpool, and the defendant endeavoured to justify "as to such parts of the supposed libel as purport to contain an account or statement of the trial of the plaintiff for an assault, &c. and of the facts, circumstances, and statements which occurred," held too general and indefinite. 3 Smith, 491.

< Where in an action for a libel, the defendant justifies as to a part of the charge, but not as to the whole, the plea will be bad on demurrer. *Sterling v. Sherwood*, 20 Johns. Rep. 204. *Eales v. Shackelford*, 1 Litt. 35. >

Justification of a libel, that there was reason for thinking the imputation was true from what had been said, held bad on special demurrer, for not stating what had been said, and by whom. 1 Price, 76.

A stranger who justifies a publication defamatory of another's title, under the party claiming title, must shew that it was made by his authority. 1 M. & S. 304.

**(2 L 6.) What shall be a good justification.**

If the words accuse of felony, the defendant in justification may say *quod furatus fuit*, &c. 1 Sand. 243, 4.

If of perjury, that the defendant was perjured in his answer in chancery. Clift. 103.

Or, when he was a witness at *nisi prius* or sessions of the peace.

[\*337]

Or, when examined upon interrogatories in chancery.

That he falsely swore a debt upon a foreign attachment. R. Bendl. pl. 216. 1 And. 12.

That being sheriff, he sold the office of under-sheriff, contrary to his oath. Bro. R. 97.

That being upon a jury in a leet, the plaintiff revealed secrets contrary to his oath. Bro. V. M. 119.

So, if there is a general pardon, a justification for words, which accuse of treason, will be good, if the plaintiff does not plead it for he may be within the exceptions. R. Ray. 23.

[\*]So, if the defendant justifies, and a verdict be thereon found for the plaintiff, he shall not have judgment, if the words are not actionable. R. 2 Lev. 51.

### (2 L 7.) What not.

But the defendant to an action for defamation cannot plead that the plaintiff *non fuit damnificatus modo et forma*. R. Dy. 26. b.

So, it is no plea that the plaintiff was not of good fame *proul*. Dan. 172.

That there was a common fame that the plaintiff was guilty. { Vide Wolcott v. Hull, 6 Mass. Rep. 514. }

In an action for a libel, the defendant under the general issue may prove, in mitigation of damages, that the plaintiff was generally suspected to be guilty of the crime thereby imputed to him. 1 M. & S. 284. { Vide Bailey v. Hyde, 3 Conn. Rep. 463. } Secus, where he has pleaded in justification that the charge is true. Id. 286.

What is a malicious publication, it is for the jury to determine. 2 Smith, 3.

It is no justification to plead that such a one told the slander to the defendant. 7 T. R. 17. { Vide Binns v. M'Corkle, 2 Browne, 79. Kennedy v. Gregory, 1 Binn. 85. Morris v. Duane, 1 Binn. 90. in nota. }

But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. Ibid. { Vide Hersh v. Ringwalt, 3 Yeates, 508.

But a charge of felony is not justified, by evidence proving, that the plaintiff had taken a swarm of bees with their honey, from the tree of a third person; the bees having been confined to the tree, but not otherwise reduced to possession. Wallis v. Mease, 3 Binn. 546.

So, it is not a justification, in an action against the printer of a newspaper, for a libel, that it was published at the request of a third person, whose name was given at the time, and who paid for it in the usual course of business; but it may go in mitigation of damages. Runkle v. Meyer, 3 Yeates, 518. }

### (2 M) PLEADING IN AN ACTION FOR A DISTURBANCE.

As to the declaration and pleas in an action on the case for disturbance, vide Action on the Case for a Disturbance, (B 1, 2.)

### (2 N) PLEADING IN AN ACTION FOR A NUISANCE.

As to the declaration in an action on the case for a nuisance, and pleas thereto, vide Action on the Case for a Nuisance, (E 1, 2.)

As to proceedings in a *quod permittat*, vide Action on the Case for a Nuisance, (D—E, &c.)

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(20) PLEADING IN AN ACTION FOR A MISFEASANCE.

The declaration in an action for misfeasance in an officer must shew, that the defendant was an officer, that it was his duty to do, and that he acted contrary to his duty.

As, if it be for a false return of a writ for an election to parliament, he must shew that such writ issued and was delivered to the defendant, being sheriff, who proceeded to the election *secundum exigent. brevis*, and that the plaintiff *fuit debito modo elect.*, but the defendant returned another elected. (Com. 132. 1 Ld. Raym. 904.)

{ So, in an action for a false return, the declaration must allege the falsity of the return, and the materiality of the matter averred to be falsely returned. *Kidzie v. Sackrider*, 14 Johns. Rep. 195. }

But, if the declaration shews the misfeasance, it is sufficient, though it omits several circumstances not material: as, if the action be for tearing the seal from a deed, whereby an annuity or rent was granted, though it does not say that it was the seal of the grantor, or what seal, or that thereby he lost his annuity, or the deed was void, or whether it was an annuity or rent charge. R. 2 Cro. 255.

{ No action will lie at the suit of an individual, against a publick officer, for a misfeasance or non-feasance, in the performance of his duty, without shewing special damage; and the special damage must be particularly alleged. *Butler v. Kent*, 19 Johns. Rep. 223. }

In actions for malicious prosecutions or arrest, it must be shewn that the [\*]original suit is terminated, otherwise there might be two contradictory verdicts. Dougl. 215. The rule holds in a malicious commitment under the warrant of a magistrate, upon a charge of felony, since that is but a preparatory step in order to trial. 2 T. R. 225. { Vide *Thomas v. De Graffenreid*, 2 Nott & M'Cord, 143. *Smith v. Shackelford*, 1 Nott & M'Cord, 36. }

In an action for a malicious prosecution, by a commitment under a magistrate's warrant upon a charge of felony, the averment that the plaintiff was discharged from his imprisonment, without disclosing upon what grounds, does not sufficiently shew that the prosecution is at an end, since he might have been discharged, and the prosecution still be carried on. To say that he was acquitted is sufficient, since that means by the verdict of a jury. 2 T. R. 225.

In case for a malicious arrest in an inferior court that had no jurisdiction, and averment that defendant knew that the court had no jurisdiction, seems unnecessary. 2 Wils. 302.

In case for a malicious prosecution for felony, a copy of the record and acquittal must be proved; *secus*, if only for a misdemeanour. 1 Blk. 358.

In an action for a malicious prosecution for felony, the original record, or a copy, must be admitted in evidence, however obtained; though, if surreptitiously proceedings will be stayed. 14 East, 302.

In case for malicious prosecution, the plaintiff must prove malice, express or implied, and the want of probable cause. 4 Burr. 1971.

From the want of probable cause, malice may be, and usually is, implied. 1 T. R. 545.

Proof of an acquittal, from want of prosecution, is not presumptive proof of malice in an action for a malicious prosecution. 9 East, 361.

A *nonpros* affords no inference of malice. 4 Taunt. 7.

An action for malicious prosecution in indicting the plaintiff for an assault and battery, where the bill has not been found, cannot be supported without evidence of express malice, as well as of the want of probable cause. 1 Mars. 12. 5 Taunt, 187.

The essential ground of an action for malicious prosecution is, that a legal prosecution was carried on without a probable cause. Every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied. 1 T. R. 544, 545. 784. { Vide *Sommer v. Wilt*, 4 Serg. & Rawle, 23. *Marshal v. Bussard*, 1 Gilm. 9. *Bell v. Graham*, 1 Nott & M'Cord, 278. *Kelton v. Bevins*, Cooke, 90. *Watkins v. Baird*, 6 Mass. Rep. 506. *White v. Dingley*, 4 Mass. Rep. 433. }

To an action upon the case for a misfeasance the defendant shall plead not guilty. Cro. El. 569.

Or, not guilty *infra sex annos*. Lut. 99.

{ In an action for a misfeasance, the plaintiff cannot give in evidence a non-feasance, and *vice versa*. *Doane v. Badger*, 12 Mass. Rep. 65.

In an action for stopping ancient lights, it is unnecessary to allege, that the lights are ancient, or that the plaintiff is entitled to the easement by prescription; but these facts may be proved, if necessary, on the trial. *Story v. Odin*, 12 Mass. Rep. 157.

What shall be evidence of an acquittal, on a charge of felony. *Dougherty v. Dorsey*, 4 Bibb, 207.

In action against the sheriff for neglecting to return a writ of *fi. fa.*, a plea that the defendant had not been ruled to make return, is bad. *Burk v. Campbell*, 15 Johns. Rep. 456. }

## (2 P) PLEADING IN AN ACTION FOR NEGLIGENCE.

### (2 P 1.) In his office, &c.

In an action against a sheriff, &c. for an escape, the plaintiff must shew a judgment against him who escaped. R. 1 Lev. 191.

And ought to say directly that he recovered, and not *quod cum recuperasset*. Semb. 1 Sid. 306.

If an escape be out of the counter upon a plaint before one sheriff of London, the action shall be against the two sheriffs. R. Carth. 145.

But, in an action for an escape, the plaintiff need not shew how the debt in the original action became due. Lut. 110. Vide ante, (E 18.)

Nor the original, and all the proceedings thereon; for it is sufficient to begin *quod cum recuperasset*, &c. R. Cro. El. 877.

[\*]Nor shew the original, &c. though the escape was of one outlawed by mesne process; for it is sufficient to say, *quod cum implacitasset*, &c. Lut. 111.

Nor shew that he did not find bail, though the precept in the counter be *nisi interim inveniat manucaptiores*; for it will come from the other side, if he found them. R. Sho. 162. 2 Bos. & Pul. 561.

Nor say that the debt was not satisfied; for it shall not be supposed. R. 1 Rol. 47.

To this the defendant shall generally plead not guilty.

But if the action be for not returning a writ, &c. the defendant may plead *quod pertinuit ad alium*.

So, in an action for an escape, the defendant may plead *non permisit ire ad largum*. 5 Co. 89. a. 10 Ed. 4. 10. b.

Or, *nul tiel record*. R. Hob. 209.

So, *quod non arrestavit*. Ash. Ent. 14.

*Quod recenter insecutus fuit*. 3 Co. 52. Vide Ent. 195. 198.

And a voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit. 2 T. R. 126.

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And by the stat. 8 & 9 W. 3. 27. it shall not be allowed in evidence without plea.

By the same statute, plea of fresh suit shall not be allowed without an affidavit that the escape was without consent.

That he was rescued after an arrest upon mesne process. Lut. 130. R. 3 Lev. 46. R. 2 Lev. 144. R. 2 Cro. 419. R. cont. Cro. El. 868. R. acc. 16 Ed. 4. 3. Vide infra.

A rescous may be pleaded, without saying that he returned the rescous. R. 3 Lev. 46. 2 Lev. 144.

Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. 2 T. R. 126.

If an action be for a voluntary escape, he may take by protestation, that it was not voluntary, and plead *recent. insecut.* R. 1 Vent. 217.

There is no need to traverse that the escape was voluntary. R. Latch, 201. [2 T. R. 126.]

But the defendant cannot say that the party afterwards appeared at the return of the writ. Lut. 72, 73.

So the defendant cannot plead a rescous to an escape upon a judicial process. R. 3 Lev. 46. R. Mo. 852.

Nor, upon mesne process. Mo. 852. Vide supra.

Though the arrest be upon a *latitat*, whereon the cause of action does not appear. Mo. 852.

But he shall not plead, in an action for not keeping a ferry where he ought, that he erected a bridge there. Semb. 1 Sal. 12. Vide post, (2 S 2.)

### (2 P 2.) In keeping a dog, &c.

A declaration for a neglect in keeping his dog, horse, cattle, &c. must say that the defendant was *sciens* of the mischievous quality. } Vide *Vrooman v. Lawyer*, 13 Johns. Rep. 339. } Vide Action on the Case for Negligence, (A 5.)

So, if *sciens*, or *scienter* is omitted, it will be bad after verdict. R. Sal. 662.

[\*] But, *quod habuit suam ad mordendum animalia consuet.* will be well after verdict; for it shall be intended to have been proved that they were animals of which the defendant had notice, and the biting of which was a damage and loss to the plaintiff. R. Sal. 662.

To such action the defendant shall plead not guilty.

Or, that the dog made an assault upon his dog.

So, to every action on the case for misfeasance or non-feasance, the defendant shall plead not guilty.

But in action on the case for non-feasance, it was resolved, that the defendant shall not plead not guilty, though in an action for misfeasance he may; for not guilty to non-feasance are two negatives, which do not make an issue. Cro. El. 569.

But, it is no plea that he made the thing more beneficial for the plaintiff; for this being a voluntary act, it does not excuse him for the neglect of his duty: as, in an action upon the case for not keeping a ferry, it is no plea, that he erected a bridge, which was more commodious. R. Sho. 257.

## (2 P 3.) In keeping fire.

A declaration in an action founded on the custom of the realm, for not taking care of his fire, must shew the custom of the realm, and the damage by the defendant's neglect. Ash. Ent. 23. 56. Vide Action upon the Case, (B 2, 3.)—For Negligence, (A 6.)

And, therefore, if it enlarges to foreign matter, it is bad. Lut. 90.

But, it need not say, time whereof, &c. for *secundum legem et consuetudinem regni*, is sufficient. R. 2 H. 4. 18. b. Vide Action on the Case for Negligence, (A 6.)

And it is sufficient, if it says, *ne dampnum alicui eveniat*, though it is not, *alicui vicino*. 2 H. 4. 18. R. 3 Lev. 359.

So, if it says, *ignem suam*, though he has no property in the fire. 2 H. 4. 18. a.

To this action the defendant may plead not guilty.

So, he may plead *quod ignotus combussit messuagium per quod*, and traverse the neglect in keeping his fire. 1 Bro. Ent. 29.

By the st. 6 An. 31., if an action be brought against any, in whose house or chamber any fire accidentally began, or for any thing done by virtue of that act: the defendant may plead the general issue, and give in evidence the said act; and if the plaintiff be nonsuit, discontinue, or have a verdict against him, he shall pay treble costs.

## (2 Q) PLEADING IN AN ACTION AGAINST A COMMON INN-KEEPER.

As to the declaration against a common innkeeper for the negligent keeping of the goods of his guest, vide Action upon the Case for Negligence, (B 1.)

To this action the defendant shall plead not guilty.

Though he has matter of excuse; as, that his inn was full, &c. 1 And. 29.

## [\*](2 R) PLEADING IN AN ACTION AGAINST A COMMON CARRIER.

As to the declaration in an action against a common carrier and pleas thereto, vide Action on the Case for Negligence. (C 2, 3.)

## (2 S) PROCEEDING IN ACTIONS UPON SEVERAL STATUTES.

When an action lies upon a statute or not, vide Action upon Statute (A 1.—B).

How it shall be sued by *qui tam*, &c. or the party grieved, vide Action upon Statute (E—F).

When the statute shall be recited or not, and how, vide Action upon Statute (G—H—I).

## (2 S 1.) Upon the statute of Winton 13 Ed. 1. of hue and cry.

If an action be commenced upon the statute of hue and cry, 13 Ed. 1. the plaintiff must take out his original. Vide Hundred, (C 1. &c.)

And the suit in B. R., as well as in C. B., must be commenced by original; for the inhabitants of a hundred cannot be in the custody of the marshal. R. 3 Keb. 126. Vide 2 Sand. 375. 4 Mod. 296.

And the original usually recites the statute. Th. Br. 141. 1 Bro. Ent. 99. 2 Sand. 374. 4 Mod. 296.

The original shall be tested forty days (in Leonard it is by mistake said, half a year) after the robbery, otherwise it is error. R. 2 Leo. 12. Vide post, (2 S 4.)

Because the hundred is not liable, if the robber be taken within 40 days after the robbery was committed. Doug. 704.

And within a year after the robbery. R. 1 Brownl. 156.

And the day on which the robbery was committed is to be included in the year. Doug. 465.

But, if the day of the robbery be mistaken, it may be amended. R. 1 Brownl. 156.

If several are robbed together, they cannot join in an action against the hundred, except where they are joint owners of the money stolen. R. Dy. 370. a. 2 Leo. 12.

- It is amendable, not being a penal action. Andr. 115.

**(2 S 2.) Declaration must be against the inhabitants of the hundred generally.**

The declaration must be against the inhabitants of the hundred generally.

For, if it is against any by name, and all are not named, it is bad. R. 2 Keb. 126. Adm. cont. Bend. pl. 157.

Declaration need not recite the original at large. Per Rule, 1654, Mills, 26.

Declaration need not recite more of the statute than is pertinent to the action. R. 2 Vent. 215. Vide Action upon the Statute (1).

[\*]And therefore may omit the part of the act concerning the burning of houses. 2 Vent. 215.

**(2 S 3.) Reciting the statute.**

And if it recites the sense, though not the exact words of the statute, it is sufficient. Vide Action upon Statute (1).

As, if it is, *quod respond. pro malefactoribus*, where the statute says *pro corporibus malefactorum*. R. 2 Vent. 215.

**(2 S 4.) Must shew the time of the robbery.**

The declaration must shew the time when the robbery was committed, whereby it may appear that the action was commenced after forty days since the robbery. R. 2 Leo. 12.

And the forty days for taking the thieves are limited by the statute of Winton, (for the 28 Ed. 3. 11. is only a confirmation thereof,) and therefore they who say that half a year was allowed by the statute of Winton, are mistaken. R. 3 Lev. 320.

**(2 S 5.) And that it was within the hundred, &c.**

So, the declaration must shew the robbery to be within the hundred, and upon the highway.

But though the parish be mistaken, if it be within the hundred, it is sufficient. R. 2 Leo. 175. Ow. 7.

And if the parish be not alleged within the hundred, it is good after a verdict. R. 3 Mod. 258.

So, if it does not appear that the robbery was in the highway, it shall be aided after verdict. R. 3 Mod. 258. Sho. 60. R. 1 Mod. 221. Carth. 71. Vide Hundred, (C 2—4.)

So, if it does not appear that the robbery was by day-light. R. 3 Mod. 258. Carth. 71.

**(2 S 6.) Must allege oath before a justice of peace.**

So, the declaration must allege that he made oath before a justice of peace, pursuant to the st. 27 El. 13. that he did not know the robbers. Cont. for the declaration need not shew it. Sal. 614. Vide Hundred, (C 4.)

It is not necessary to aver that the justice was such at the time. And. 115.

If the robbery was by four, oath, that he did not know them, is not sufficient, without saying *nec eorum aliquem*. Per three J. Noy, 21. Dub. 3 Lev. 328. 12 Co. 62.

**(2 S 7.) And notice.**

So, the declaration must allege that the plaintiff gave notice of the robbery.

It is not necessary to aver that the high-constable was the only one, nor that he was such at the time. Andr. 115.

**[\*](2 S 8.) And property of the goods.**

So, the declaration must allege that the plaintiff has the property of the goods stolen.

If a servant be robbed of his master's money, he may declare *de pecun. ipsius querent. propr.* R. 4 Mod. 303. R. 2 Leo. 82.

And if the plaintiff declares *de pecun. in custodia ipsius querent.* without saying *de pecun. querent. propr.* it is bad. R. 2 Sand. 379.

But where the plaintiff declares that he was robbed *de bonis ipsius querent. propriis*, and of other goods in *custodia querent.* on demurrer to the whole declaration, the plaintiff shall have judgment for so much as is well alleged, and shall be barred only for the residue. R. 2 Sand. 379. Vide ante, (C 32.)

**(2 S 9.) And particulars of them.**

So, the plaintiff must name the goods stolen in his declaration particularly; for it is not sufficient to say, *quod diversa bona ceperunt*. R. 2 Sand. 379. Vide ante, (C 21.)

But he need not in the writ, if he particularise them in his declaration. 2 Sand. 379.

And, as much certainty as in *trover*, &c. is sufficient. 2 Sand. 268.

**(2 S 10.) Must conclude *contra formam statuti*.**

The declaration must conclude *contra formam statuti*, for *contra formam statutorum* is bad, the action being founded upon the st. Wint. 13 Ed. 1. only, and not on the st. 27 El. R. Yel. 116. Eg. 1 Vent. 235. Vide Indictment, (G 5, 6.)

But *contra formam statuti*, without more, is sufficient; for it shall be intended the st. of Winton. R. Yel. 116. Noy, 125. 2 Cro. 187. And, 115.

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(2 S 11.) Plea.

To an action against an hundred the defendants may suffer judgment by confession, or *non sum informatus*.

Or, the defendants may plead, not guilty. Vide Ent. 211. 1 And. 158.

So, they may plead, that the plaintiff did not make hue and cry to give notice of the robbery. Co. Ent. 350. a. Bend. pl. 157.

But Semb. cont. for the plaintiff need not make hue and cry, but by the st. 27 El. 13. he ought to give notice to the next vill, or hamlet, and this shall be proved on not guilty. Vide Hundred, (C. 2. 4.)

So, they may plead that they took one of the robbers on fresh suit. 1 Vent. 118. Vide Hundred, (C 4.)

But it is no plea for the hundred, that they made fresh suit, if they did not take any of the robbers. R. Dy. 370. a.

[\*](2 S 12.) *Venire facias*.

If the defendants plead, after issue, a *venire facias* shall be awarded to the next hundred. Thes. Br. 144.

(2 S 13.) Judgment.

As to judgment against the hundred, vide Hundred, (C 5.)

If there be judgment for the hundred, the inhabitants of the hundred may sue for costs by debt or *scire facias* on the judgment; for, though no corporation, they may have an action *quoad hoc*. R. F. g. 296.

Or, if the plaintiff be in execution for the costs, and escapes, they may have an action against the sheriff for the escape. Ibid.

If the record is said to be taken before the secondary to the chief clerk, it is well; and the court will take notice without averment, that he was then officer. Andr. 115.

(2 S 14.) Upon the statute 2 (or 2 & 3) Ed. 6. 13. for tithes.—  
By whom it lies.

Action of debt lies on the st. 2 (or 2 & 3) Ed. 6. 13. for the treble value for not setting out his predial tithes. 2 Inst. 650. 612. R. Cro. El. 608. 613. 621. R. Mo. 710.

The party entitled to the tithe, when served, must sue for the treble value. 1 B. & P. 458.

But it must be by the party alone, and not by *qui tam*, &c. R. Mo. 911. Cro. El. 621. Semb. Sav. 63.

And may be by the rector, or by the farmer of the rectory. R. 2 Cro. 70. Mo. 915.

And may be by an executor for not setting out tithes in his testator's time.

So, it lies by the husband alone, seised in right of his wife, for tithes arising after his marriage. Cont. Noy, 136.

Or, husband and wife may join. R. Noy, 136. Adm. Mo. 912.

So, it lies by a farmer of two parts of a rectory by one title, and of the third part by another title; for he declares as farmer, and need not mention the title. R. Yel. 63. Mo. 915. 2 Cro. 68. 1 Brownl. 86. Noy, 3.

So, by two farmers of the same rectory. 2 Cro. 70. Mo. 915.

But two, who claim by several titles, cannot join in debt upon this statute. R. Yel. 63. 1 Brownl. 86.

As if one claim two parts, and the other the third part of the same rectory. R. Yel. 63.



Evidence that the parishioners have treated with the proprietor for a composition, is not alone sufficient to establish his possession of the tithes in an action on this statute. 1 B. & P. 458.

Quære. Whether, if one only of two joint-tenants execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out? Ibid.

[\*](2 S 15.) Against whom.

Debt lies on the st. 2 (or 2 & 3) Ed. 6. 13. against two jointtenants, who occupy together. R. Hut. 121.

Or, against one joint-tenant, or tenant in common only, if he occupies the whole. Ibid.

But it does not lie against several tenants for their several tithes. R. Yel. 63.

(2 S 16.) Declaration.

The plaintiff in his declaration need not recite the statute. Per Rul. 1654, Mills, 27. Per Holt, Sho. 337.

And if it be recited to be made at a parliament, 4 Nov. 2 Ed. 6. when the parliament began 1 Ed. 6. and so was prorogued till 4 Nov. 2 Ed. 6. yet it shall be allowed, for there are several precedents so. R. Yel. 127. Vid. Dy. 171. a.

And if it be recited *aggreavit cum rector. firmar. aut aul. proprietar.* where the statute says, other owner, proprietor, &c. so owner is omitted, it is not material. R. 2 Cro. 362.

The plaintiff, in his declaration, need not shew any title; for it is sufficient to say *quod cum sit rector, &c. or firmar. et proprietar. decimarum, &c.* R. 2 Bul. 66. 2 Cro. 318. R. 2 Cro. 362. 437. R. 2 Bul. 228. D. Yel. 63. 1 Brown. 86.

And, if he shews a grant to himself, he need not say, it was by deed, though tithes cannot be granted without deed. R. 2 Bul. 228. 1 Rol. 13.

So, if he claims by lease under the king's patentee, he need not shew the patent.

So, it is sufficient that the plaintiff alleges himself *proprietar.* without saying *conjunctim*, or in common.

So, if he says that he is *proprietar. decimarum et 60 acrar.* in D. without saying which in certain. R. H. 7 Car. Rot. 587. in B. R.

So, it is sufficient, if he says that he is rector of A., and *ratione inde* ought to have tithes out of the parish of B., which is another parish. R. Hard. 173.

The plaintiff in his declaration usually alleges that the plaintiff is *proprietar. &c.* that the defendant occupied lands within the parish, and sowed them, and reaped and carried away his grain, without setting out the tithes or agreement with the rector, &c. for them.

So, if he claims as rector, &c. he must allege the tithes taken to belong to the rectory. R. Jon. 322.

But the non-payment of the treble value is the gist of the action, and the possession, and the whole declaration precedent is but inducement; and, therefore, if it be alleged as recital, the declaration is good. R. 2 Cro. 362.

So, the declaration is sufficient; though it does not show that the defendants occupy jointly or in common.

Though it does not show the kinds of grain sown. R. 2 Cro. 438.

[\*]Nor, by whom it was sown. R. 2 Cro. 362.

Or, if it alleges the time of the severance before the sowing.

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Or, more than a year after ; for it is possible. R. 2 Cro. 362.

So, if it does not allege the time of severance, but says, that 30 Sept. *sic inde possessionat. messuit* ; for it shall be intended that he severed the same day on which the possession is alleged. Ibid.

So, if the day of severance be coupled with the removal of the grain, Ibid.

Or, if the term was expired before the day alleged of the removal. R. 2 Cro. 324.

So, if the quantity of the land sown, and the quantity severed, vary : as, if he says *quas quidem* 30 acr. for 40, the word thirty shall be rejected as surplusage. 1 Sid. 135.

So, if the declaration does not say that the defendant did not agree with the plaintiff, it will be good after verdict, though not upon a demurrer. R. Carth. 304.

So, it is sufficient that the declaration demands the single value ; for it shall be trebled by the jury or court. 2 Rol. 54, 55.

And if it adds the treble value, and it is mistaken, it will be good. 2 Rol. 55.

The plaintiff must allege in his declaration what brings the party within the statute, and therefore he must allege him to be the subject of the king that now is.

If he recites the statute, and says, that he is *subditus dicti domini regis*, it is bad ; for this refers to Ed. 6. Per three J. 2 Cro. 325. Vide infra.

He must allege a *venue*, where the tithes are alleged to be carried away without severance ; for this is the gist of the action. R. Yel. 127.

So, it is sufficient if he alleges the value of the tithes to be 11*l.* *et sic actio accrevit ad habendum pro triplici valore* 32*l.* The miscasting is no prejudice. R. 2 Cro. 499. Vide ante, (C 84.)

So, if he alleges that the defendant is occupier, it is sufficient, though he does not say that he is a subject ; for it implies as much. R. Hard. 173. Vide supra.

So, if there are two plaintiffs, and they allege that the defendant did not agree with them, it is sufficient, without saying *vel eorum altero*, for it is implied. R. 2 Cro. 70.

A declaration, stating that tithes were within forty years next before the statute paid, &c. was ordered to be amended, and the word payable to be inserted in it. 5 T. R. 264. n. a.

### (2 S 17.) Plea.

To debt upon the st. 2 (or 2 & 3) Ed. 6. 13. the defendant may plead *nil debet*. R. Hob. 218. Cro. El. 608.

Or, may plead not guilty. R. Mo. 914. 302. R. Cro. El. 621.

Not guilty, pleaded to an action of debt on a penal statute, is not such a nullity as warrants judgment to be signed for want of a plea. 1 T. R. 462.

Whether not guilty may not be pleaded to an action of debt on a penal statute ? Quære. Ibid.

[\*]So, an agreement with the plaintiff for his tithes for three years, though it be not by deed ; for it will be good between the parties, and shall be a bar by the statute, though it does not pass the right of the tithes. R. Ray. 14.

But a plea, that after the tithes were set out the owner of the soil took them damage feasant, is not good ; if it does not shew *quamdiu* they remained on the land. Latch, 8.

**(2 S 18.) Action upon the stat. 1 R. 3. 3. for seizure of a felon's goods before conviction.**

If action be upon the st. 1 R. 3. 3. for taking the goods of one accused of felony before conviction, the plaintiff must recite the statute, and shew the breach. Lut. 132.

**(2 S 19.) Upon the stat. 1 & 2 Ph. & M. 12. for 5l. for driving a distress three miles, &c.**

If action be upon the st. 1 & 2 Ph. & M. 12., for driving a distress out of the hundred, &c. above three miles, the defendant may plead, not guilty. Co. Ent. 44. b.

That the taking was by *capias in wilhernam*. Co. Ent. 44. a.

**(2 S 20.) Upon the stat. 8 H. 6. 9. for a forcible entry.**

If action be upon the st. 8 H. 6. 9. for a forcible entry, or detainer, the plaintiff in his declaration must recite the statute. Lut. 1548. Co. Ent. 44. b. 315. b. Vide Action upon Statute (G.)

To this action the defendant may plead, not guilty. Cl. Ass. 34.

*Non est ingressus contra formam statuti.* Co. Ent. 46. a.

*Non expulit nec disseisivit querentem.*

**(2 S 21.) Upon the stat. 23 H. 6. 8. for being under-sheriff two years together.**

If an action be upon the st. 23 H. 6. 8. for using the office of under-sheriff two years together, the plaintiff must recite the statute and the offence. Lut. 193. Lev. Ent. 135.

He need not aver that the sheriff had no estate of freehold in the office. Semb. Lut. 197.

**(2 S 22.) Upon the stat. 21 H. 8. 13. against a spiritual person. —For taking a farm.**

If an action be upon the st. 21 H. 8. 13. against a spiritual person for taking a farm, the plaintiff must recite the statute. Lut. 135. Cont. Bro. Action sur Statute 4. Vide Action upon Statute (G.)

To this the defendant may plead not guilty.

That, not having glebe, he took it for sustentation of his family. Lut. 136.

*Quod non tenuit ad firmam contra formam statuti.* Sav. 32.

And upon the last plea, he may give in evidence that it was for the sustentation of his family. Per two J. Baldwin. cont. Bro. Action sur Statute 3. Sav. 32.

**[\*](2 S 23.) For non-residence.**

If an action be upon the st. 21 H. 8. 13. for non-residence, it is usual to recite the statute. Rob. Ent. 414. Lut. 138.

**(2 S 24.) Upon the stat. 33 H. 8. 9. for using unlawful games.**

If an action is brought upon the st. 33 H. 8. 9. for using unlawful games, the plaintiff may recite the statute and shew a breach. Lut. 133.

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To this action the defendant may plead *quod non custodivit domum lusorum, &c.* Lut. 134.

(2 S 25.) Upon the stat. 13 R. 2. and 2 H. 4. 11. for suing in the admiralty for a matter not *super altum mare*.

If an action be upon the st. 13 R. 2. 5. 15 R. 2. 3. and 2 H. 4. 11. for suing in the admiralty for a thing not done *super altum mare*, it must be by *qui tam, &c.* Dy. 159. b. Vide Action upon Statute, (E 1. &c.)

The plaintiff in his declaration must surmise the effect of the libel, and suggest that the matter arose *infra corpus com.* and not, *super altum mare*. Dy. 159. b.

And in actions upon these statutes, the party shall recover double damages, and the king 10l. Dy. 159. b.

And the costs as well as the damages shall be doubled. Dy. 159. b. Vide Costs, (C 1. &c.)

(2 S 26.) Upon the stat. 5 El. 14. for forgery.

If an action be upon the st. 5 El. 14. for forgery he must recite the statute and the offence. Lut. 191.

(2 S 27.) Upon the stat. 8 El. 2. for suing in another's name, without his consent.

If an action be upon the st. 8 El. 2. for suing in another's name without his consent, the plaintiff must recite the statute, and shew the offence. Lut. 166.

And it well lies, though there be no conviction before, for the proof may be in the same action. R. 2 Cro. 188.

But an attorney is out of the statute. Semb. Lut. 169.

So, it does not lie for a suit in C. B. for it is not mentioned in the statute. R. Lut. 169.

(2 S 28.) Upon the stat. 25 Car. 2. 2. for not taking the test.

If an action or information be upon the st. 25 Car. 2. 2. for not taking the test, the plaintiff must expressly allege that the defendant was admitted to the office at such a time, and that he did not take the oaths, &c. at such a time; for it is not sufficient to say, that he was an officer, and never took the oaths. Lut. 162.

[\*]So, he must demand the penalty by express words, *per quod actio accrevit ad habendum, &c.* Dub. Lut. 163.

Must shew a conviction prior to an action or information for the 500l. penalty. Semb. Lut. 163. it was not shewn Clift. 123. but it was in Sir Edward Hale's case, Clift. 133, 4.

So, he must expressly aver that the defendant exercised the office after the time limited for taking the oaths. Lut. 163.

So, he must recite the oath tendered conformable to the statute. R. Ray. 374, 5.

And the same law shall be in an information for not taking the association. Clift. Ent. 392, 393.

To this action, or information, the defendant may plead that he took the oaths pursuant to the statute. Lut. 161.

If the defendant pleads that he took the oaths, he must conclude *prout patet per recordum*. Semb. Lut. 163.

He must shew that he was admitted to the office when he took them. Lut. 163.

So, if a man neglects taking the oaths, &c. after admission to an office, he will be an officer from the time of his admission till three months expire.

And after neglect he may maintain an action against a stranger for the profits of the office received during that time. R. Lut. 910.

**(2 S 29.) Upon the stat. 2 W. & M. 5. for rescous of a distress.**

If an action be for rescous of a distress upon the st. 2 W. & M. 5. the plaintiff must shew the demise, distress for rent arrear, and rescous. Lut. 213.

He must shew the whole substance of the lease. Semb. Mod. Ca. 215.

And if he says that he was seised in fee and leased, he must prove a seisin in fee. R. Mod. Ca. 215.

But he need not say that notice was given; for it is nothing to the defendant, though necessary to the owner. R. Lut. 214.

Nor, that the corn distrained was threshed, or unthreshed. Ibid.

He need not shew a thing collateral to the lease; as, that he gave a quarter's warning. Per Holt, Mod. Ca. 215.

**(2 S 30.) Upon the stat. 4 & 5 W. & M. 8. for apprehending highwaymen.**

If an action is brought upon the st. 4 & 5 W. & M. 8., against the sheriff for non-payment of the allowance for apprehending highwaymen, &c. the plaintiff must recite the statute, and every thing that entitles him to the allowance within the statute. Clift. 120. New Digest, Hundred, Ill. (d.) IV. (c.)

**[(2 S 31.) Upon the stat. 9 G. 1. c. 22.]**

In a declaration upon the st. of 9 G. 1. c. 22., it was laid that two stacks of oats of the plaintiff were set on fire feloniously; and well enough, though [\*]objected, it ought to have been laid to have been done unlawfully and maliciously. 8 Wils. 318. 2 Blk. 842.

The deposition on oath required by st. 9 Geo. 1. c. 22. s. 7., is a condition precedent to the right of the party grieved against the hundred under that statute, and must therefore be averred to have been made, and in what terms, in the declaration. 8 East, 400.

An averment, that notice was given to the parish near the place, &c. is sufficient after verdict in an action on stat. 9 Geo. 1. c. 22. s. 8. 8 East, 173.

**[(2 S 32.) Upon the stat. 41 G. 3. c. 24.]**

In an action on stat. 41 Geo. 3. c. 24., which gives a remedy against the hundred for the riotous demolition of mills, it is not necessary to allege in the declaration, that the offence was a felony, or committed feloniously. 2 Mars. 362. 7 Taunt. 45. 3 Price, 48.

**(2 T) PLEADING IN ACCOUNT.**

As to process, declaration, pleas and other proceedings in account, vide Account, (E 1, &c.)

In account there are two judgments; the first judgment is *quod* defendant *computat*.

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And upon such judgment a *capias ad computendum* lies. 1 Brownl. 24. Br. Jud. 17.

If *non est inventus* be returned thereon, an *exigent* goes. Ibid.

But if he be taken on the *capias*, he shall be bailed. 1 Brownl. 24. though *ex rigore* he ought to account in prison. Vide Accompt, (E 18.)—Bail, (G 2)

As to the writ, declaration, pleas, judgment, &c. in annuity, vide Annuity, (D—E—F—G—H.)

As to the writ, count, pleas and other proceedings in appeal, vide Appeal, (G 1, &c.)

As to the plaint and other proceedings in assise, vide Assise, (B 8, &c.)

As to the pleadings in attain, vide Attaint, (C 1, &c.)

As to proceedings in *audita querela*, vide Audita Querela, (E 1, &c.)

## (2 V) PLEADING IN COVENANT.

### (2 V 1.) Process.

A writ of covenant shall be sued in B. R. or C. B.

Or, covenant may be sued by plaint in the county or hundred. F. N. B. 145. E. Reg. 166.

Or, by justices. Reg. 167.

If it be sued by plaint in the county, it may be removed into C. B. by *recordare*. F. N. B. 145. E.

So, in the hundred, it may be removed by *accedas ad curiam*. F. N. B. 145. E.

If it be sued by justices, it may be removed by *pone*. Reg. 166, 167.

The process in covenant in C. B. by the common law was summons.

[\*]And now, by the st. 23 H. 8. 14. like process as in debt; and therefore an outlawry.

### (2 V 2.) Declaration.

The declaration in covenant shall be laid in the county where the covenant was made. F. N. B. 146. E. Vide Action, (N 6.)

The declaration ought to be founded upon a deed; for covenant does not lie without deed, except by the custom of London. Vide Covenant, (A 1.)

And, therefore, if the declaration be, *quod cum per script. articul. &c. convenit*, without saying, *sigillat.*, it is bad. R. Cro. El. 571. Vide post, (2 W 9.—2 W 14.) { Vide Macomb v. Thompson, 14 Johns. Rep. 207. }

So, if the declaration be by an assignee of a reversion, he must shew an assignment by deed. R. 3 Lev. 155. Vide post, (2 W 14.)

And though he shews an attornment by the lessee, it is not supplied. R. 3 Lev. 155.

But *per scriptum suum factum apud*, &c. is sufficient; for this imports that it was sealed and executed, otherwise it cannot be *factum suum*. Semb. Cro. El. 571.

*Contra*, *per scriptum suum factum apud W. concessit*, &c. is not sufficient, for *factum* here does not signify a deed, but is an adjective. Nor is this helped by *oyer*, though it appears to be sealed. *Per totam curiam*. Str. 814. Ld. Raym. 1536.

So, *per indenturam cujus alteram partem sigillo* of the defendant, omitting *sigillat.*, will be aided by plea or verdict. R. 1 Sal. 141.

So, in covenant by an assignee, he need not shew the deed of assignment, where the thing may be assigned without deed, though the covenant ought to be by deed. R. Cro. El. 373. 436.

If a man covenants with A. who was agent for B. to pay, &c. B. shall not have covenant. Dub. 2 Mod. Ca. 116.

In an action of covenant by husband of tenant in fee, he must declare on a seisin "in fee in himself and his wife in right of his wife." If he state that he is seised "in his demesne as of freehold in right of his wife," it will be bad on special demurrer. Dougl. 329.

If a covenant be with several, and it appears by the deed, or by the count, that their interest is joint, all must join in the declaration. R. Skin. 401. Vide Obligation, (F.)

So, when it appears that their interest is joint, they must join; though the defendant covenants with them *et eorum quolibet*. R. 5 Co. 19. a. 3 Leo. 161. R. 1 Sand. 155. Sho. 8.

Or, covenants with them *conjunctim et divisim*. D. Mo. 849.

Or, several covenant with several *quolibet per se cum altero et alteris eorum* respective. R. 1 Sand. 155.

So, if the interest and covenant of the covenantors be joint, the action must be against all.

So, on a demise by A. and B., covenant must be against both upon a covenant in law, if it assigns the breach, that a stranger was seised. R. 1 Sal. 137. Carth. 98.

Otherwise, if the breach be of a covenant in law by *tort* of one of the lessors only. R. Carth. 98.

Where the covenant is joint and several in an action against one only the breach may be assigned in the neglect of both. Str. 553.

[\*] But if the interest of the covenantees be several, and the covenant be with them *et eorum quolibet*, every one may sue severally in respect of his several interest. R. 5 Co. 19. a. Mo. 849. R. cont. 2 Leo. 47.

So, if the covenant be mutual between them, *et eorum quemlibet*. R. 2 Lev. 57.

So, if the interest is several, each must sue severally; though it is said, that it was agreed between the parties, and there are several on the covenanting part. R. 3 Mod. 263.

If one named in the indenture does not execute, he must be excluded by an averment; or they may join in the action. Str. 1146.

So, if several *conveniunt separatim* to do such a thing, though they join in the covenant, yet by the word *separatim* they may be sued severally; for it is the several contract of each. R. 5 Co. 23. a. Cro. El. 408. (470.) 546.

{ So, where the declaration described the covenant as sealed by the defendant, without mentioning any other person, and the plea of covenants performed, without praying over, a joint and several covenant, sealed by the defendant and others, but in all other respects, answering to the description in the declaration, is proper evidence to go to the jury. Hollingsworths v. Dunbar, 3 Munf. 168. }

And if the seal of one of the covenantors is broken off, the deed shall be void only as to him; for it is, as it were, the several deed of each of them. 5 Co. 23. a. Vide Fait, (F 2.)

So, if several *conveniunt, pro se et quolibet eorum*. Per three J. Holt cont. 1 Sal. 393.

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So, if several *conveniunt*, covenant lies against one for a several breach by him. 1 Sal. 138.

If A. and B. covenant to collect the rents of C. and D., and that they and each of them will pay a moiety to each of them, A. alone shall have covenant against C. alone, and assign breach, that he or D. did not pay him a moiety. R. 2 Mod. Ca. 166.

A declaration in covenant must recite the deed in which the covenant is contained: as, if it be in an indenture of feoffment.

Or, in an indenture of bargain and sale. Lut. 284.

Or, in an indenture of covenant to stand seised. Lut. 287.

In an indenture of demise. Lut. 298. 308.

So, he must shew the original deed, and not a counterpart. R. Noy, 53. Vide ante, (O 3.)

But, it is sufficient to say, *quod cum testat. exist.* by such an indenture, without a direct affirmation, that by such indenture *conven.* R. Cro. El. 195. R. 2 Cro. 383. R. 2 Cro. 537. For this in covenant is only inducement. R. Cro. Car. 188. Ad. 2 Leo. 74. 2 Jon. 229. Vide ante, (E 3.)

Or, *per quoddam script. per quod testat. exist.* R. 1 Sid. 375.

So, it is sufficient to recite the deed according to the construction in law; though different from the words. R. 2 Rol. 249. l. 20. { Vide Kellogg v. Ingersoll, 2 Mass. Rep. 101. }

And that is the safest way, as it may prevent objections arising from variance. Vide Doug. 667.

So, it is sufficient to recite so much of the deed as contains the covenant. R. 1 Lev. 88. Per Rule, 1654. Mills, 27. { Vide Henry v. Cleland, 14 Johns. Rep. 400. Buster's Exr. v. Wallace, 4 Hen. & Munf. 82. }

And it is not only sufficient, but if the declaration contain more than is sufficient to maintain the plaintiff's action, the court will refer it to the master to strike it out with costs, and will animadvert on the drawer of the declaration. Cowp. 665. 727. Doug. 667.

Though it is a condition or proviso which goes in defeasance; for this will come from the other side. R. 1 Lev. 88. [Vide Doug. 272. 684. 1 T. R. 638.]

[\*]So, it is sufficient to shew an assignment to the plaintiff, though he does not name himself assignee. R. 2 Cro. 240.

So, a recital in the words of the deed does not prejudice, though they are uncertain, &c.; as, that he demised *messuagium sive tenementum*. R. Cro. Car. 188.

So, in covenant by the husband alone, *testat. exist. quod* husband and wife demised, is well. Sal. 515.

So, a mistake in the recital of an immaterial thing is no prejudice.

The plaintiff need not set out a title, when he declares on his own demise. Str. 229.

So, it is sufficient to say that he demised by indenture, in which the defendant covenanted, without shewing how he was entitled to make a demise. R. Cart. 32.

So, if he says in *placito convention. frac.*, it is as well as *de placito quod teneat convention*. R. 2 Jon. 229. Hard. 178.

So, if it be said that the plaintiff covenanted with the defendant, where it should have been, the defendant with the plaintiff, it will be aided after verdict. R. 1 Sid. 49.

Or, *quod prædict.* Thomas Chapman, where the surname is mistaken ; for *prædict.* Thomas is sufficient. R. Cro. El. 697.

A declaration in covenant ought to assign a good breach. Vide ante, (C 45, &c.)

The breach ought to be co-extensive with the import and effect of the covenant. Vide ante, (C 47.)

If it assigns for breach disturbance, &c. by a stranger, it must shew that it was lawful, and how. Vide ante, (C 49.)

If the covenant be in the disjunctive, the breach ought to be that he has not performed the one or the other. Vide ante, (C 45.)

The breach must be assigned to have been before the action brought. 1 Sid. 307. Vide Action, (E.)

In covenant several breaches may be assigned. 2 Sand. 380. Winch. Ent. 147. 1 Sal. 138.

So, by the st. 8 & 9 W. 3. 11. in debt on bond or penal sum for performance of covenants in an indenture, &c. plaintiff may assign as many breaches as he pleases ; but, before, it was double. Dy. 295. b.

And if he assigns two breaches, he ought to say that he does it *secundum formam statuti.* Per C. B. P. 7 Geo. Acc. per Cur. ibid. (Com. 376.)

This statute is compulsory on the plaintiff ; and he cannot enter up judgment for the whole penalty on a judgment by default ; as he might have done at common law. 5 T. R. 538. 636.

After *oyer* of the condition, and *non est factum* pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches pursuant to the statute ; but it is irregular to deliver such second issue without a summons and judge's order. 8 T. R. 255. Vide infra, (2 V 17).

The court will order satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond, and the costs of the action. 6 T. R. 303.

But, it is sufficient, though it is not a direct averment, *et in facto dicit*, &c. but only *licet ipse perform, omnia ex parte [\*]sua*, and the defendant entered, &c. R. 2 Cro. 383. Vide ante, (C 77.)

It is sufficient, if the breach be assigned in the words of the covenant. { Vide Sedgwick v. Hollenback, 7 Johns. Rep. 376. Marston v. Hobbs, 2 Mass. Rep. 433. } Vide ante, (C 45.)

Or, in words equivalent to the sense and intent of the covenant. { Vide Bender v. Fromberger, 4 Dall. 436. Buster's Exr. v. Wallace, 4 Hen. & Munf. 82. } Vide ante, (C 46.)

And, if the plaintiff demands more than by the covenant appears to be due, it is not bad. R. 2 Lev. 57.

So, if he demands less without shewing the residue to be satisfied, it is not bad upon a general demurrer. R. 2 Lev. 57. Vide ante, (C 84.)—Post, (2 W 7.)

Otherwise, upon a special demurrer. Semb. 2 Lev. 57.

If the plaintiff does not conclude his breach, *et sic infregit convention.*, it is not bad. R. upon a special demurrer. 2 Jon. 229.

Or, says in *fregit conventionem*, where he assigns breaches upon several covenants. R. 2 Mod. 311.

So, he ought not to repeat the covenant in the conclusion. Per Rule, 1654. Mills, 27.

In debt upon bond for performance of covenants, the breach shall be assigned in the replication. Vide ante, (F 14.)

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Where the covenant is to be performed upon a condition or consideration, or other thing previous, the declaration must aver performance. *Vide ante*, (C. 51, &c.)

{ So, where there are dependent covenants, neither party can have an action, without averring performance, or a readiness to perform, on his part. *Gazley v. Price*, 16 Johns. Rep. 267. *Vide Gardiner v. Corson*, 15 Mass. Rep. 500. *Bean v. Atwater*, 4 Conn. Rep. 3. *Fannen v. Beauford*, 1 Bay, 234.

So, a general averment of performance of covenants on the part of the plaintiff, is not only sufficient, but is the best form; the distinction being that where the act to be done involves a question of law, the *quo modo* must be pointed out; but where it is a mere matter of fact, a general averment is the most proper. *Wright v. Tuttle*, 4 Day, 313.

Of dependant and independent covenants. *Bean v. Atwater*, 4 Conn. Rep. 3. *Duval v. Craig*, 2 Wheat. 45. *Goldsborough v. Orr*, 8 Wheat. 217. }

But in covenant nothing can be alleged or averred, which varies the case, as it appears upon the deed. R. 1 Sal. 197.

Since the statute of Anne, c. 16. s. 9. attornment need not be averred in a declaration of covenant for rent by an assignee. *Vide Doug.* 283.

{ In covenant for rent against the assignee of the lessee, an averment that the rent accrued subsequent to the assignment, was due and owing to the plaintiff, &c. is sufficient, without stating, that the lessee had not paid it. *Dubois' Exrs. v. Van Orden*, 6 Johns. Rep. 105.

In declaring for a breach of covenant for quiet enjoyment, &c. it must be averred that the plaintiff was evicted by one having a lawful title, and by legal process. *Greenby v. Wilcox*, 2 Johns. Rep. 1. *Vide Sedgwick v. Hollenback*, 7 Johns. Rep. 376. *Kerr v. Shaw*, 13 Johns. Rep. 236. *Whitbeck v. Cook*, 15 Johns. Rep. 483.

But an action of covenant may be sustained, for breach of covenants of warranty and seisin, &c. if the covenantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming under an older title; and it is not, in all cases necessary to aver an eviction under such title. *Duvall v. Craig*, 2 Wheat. 45. *Vide Booth v. Starr*, 5 Day, 275. 419.

If in an action of covenant, the breach be not well assigned, the defendant shall have judgment, though his plea be bad. *Kellogg v. Ingersoll*, 2 Mass. Rep. 101. }

### (2 V 3.) Demurrer to the declaration.

If the declaration does not shew sufficient cause for the plaintiff to maintain his action, the defendant may demur to the declaration; as, if the plaintiff is not entitled to covenant against the defendant. 2 Sand. 164.

As, if the action be brought against the assignee of a lease assigned after covenant broken by the lessee. 1 Bl. 351.

If on *oyer* it appears that two others besides the plaintiffs are named in the deed, though they did not seal, defendant may take advantage of it by demurrer. Str. 1146.

If the covenant does not extend to the breach assigned. Co. Ent. 115.

So, if several breaches are assigned, he may demur to one, and plead to the others. 1 Sand. 108.

And default of a good breach is bad upon a general demurrer. Win. Ent. 120.

So, if the breach is not well assigned, he may demur specially; for it will be aided upon a general demurrer. *Vide ante*, (C 47, 48.)

If the declaration recites the indenture according to a construction which the words do not import, the defendant may demand *oyer* of the deed, and then demur. 2 Sand. 366.



So, if it recites it materially variant in any respect, he may demur specially for such cause. Win. Ent. 166.

[\*] If debt be upon a bond for performance of covenants, and the defendant shews the indenture, and pleads that there were no covenants, the plaintiff may demand *oyer*, and then demur.

So, if the defendant shews only part of the indenture, and pleads performance, the plaintiff may demand *quod indentura irrotuletur*, and then demur; for, by shewing part only, he deprives the plaintiff of the opportunity of assigning a breach in the other part. R. 3 Lev. 50.

But if several breaches are assigned, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for the part which is good. 2 Sand. 380. R. 2 Cro. 557. Vide ante, (Q 3.)

#### (2 V 4.) Plea.—When it shall be after *oyer*.

Advantage cannot be taken of any covenant omitted in plaintiff's declaration, on an action of covenant, without craving *oyer*. Fort. 354.

To an action of covenant the defendant may plead after or before *oyer* of the deed; but to debt upon a bond for performance of covenants the defendant cannot plead without *oyer* of the bond. Bro. *Oyer*, 16. 25. Vide ante, (P 1, 2.)

And after *oyer* of the bond and condition the defendant ought to set out the deed mentioned in the condition under the seal of the plaintiff. 1 Sid. 50. 97. 1 Vent. 37. R. 1 Sid. 425.

And if he does not, it will be bad on a special demurrer. 1 Sid. 50. 425. 1 Sand. 9.

And if the defendant has not the deed, the court will, upon motion, order the deed or a copy to be delivered to him by the plaintiff. 1 Sid. 50. And this of favour. 1 Sand. 9.

#### (2 V 5.) What Pleas are bad.—*Non infregit conventionem*.

To covenant the defendant cannot plead *non infregit conventionem*; for it is too general; and two negatives, viz. *et sic non tenuit conventionem, et non infregit*, &c. do not make good issue. R. 1 Lev. 183. Semb. 1 Leo. 114. R. 3 Lev. 19. [2 Bl. 1312. 8 T. R. 278.] { Vide *Terrells v. Page's Admr.* 3 Hen. & Munf. 118. }

But it shall be aided after verdict. R. 1 Lev. 183. 1 Sid. 289.

{ So, if the plea be *not guilty*, it will be cured. *Hannicutt v. Carsley*, 1 Hen. & Munf. 153. }

So, where one party covenants to do one thing, the other party doing another, defendant cannot plead want of performance on the part of the plaintiff. 2 Bl. 1312.

So, where there are mutual and independent covenants, it is no plea, to allege a breach by the plaintiff of the covenants to be performed by him. Cowp. 56. Doug. 690. 3 Wils. 387. 2 Bl. 1312.

In covenant on a quarterly reservation for the arrears of several quarters, a plea to the whole breach, which avoids the demand as to some quarters only, is bad. 5 Taunt. 27.

#### (2 V 6.) *Nil debet, &c.*

So, to covenant the defendant cannot plead *nil debet*, though the action be founded upon an indenture of demise, and breach assigned for non-payment of rent. R. upon general demurrer, 3 Lev. 170.

[\*356]

So, to debt on bond for performance of covenants, he cannot plead [\*]no covenants; for then the bond is single. R. 1 Lev. 3. R. Cro. El. 756.

Nor, can plead that there is no such indenture; for he is estopped. R. 1 Rol. 408.

(2 V 7.) What good.—*Non est factum*.

But to covenant, the defendant may plead in discharge of performance.

As, he may plead to a deed, *non est factum*.

And on this plea, the defendant, lessee in possession, shall not controvert the title of the plaintiff, his lessor, to demise. 2 Bl. 1152.

Within age. R. Cro. Car. 179.

If the heir be sued upon the father's covenant, he must plead *riens per discent*. Lut. 290. Vide ante, (2 E 3.)

(2 V 8.) Accord.

So, he may plead accord with satisfaction made after the breach. Co. Ent. 117. a. { Vide Harper v. Hampton, 1 Har. & Johns. 622. } [1 T. R. 141.] Vide Accord, (A 1.)

But accord is no plea in covenant for the payment of money. Vide Accord, (A 2.)

To covenant for non-payment of rent, it is a bad plea that defendant before rent due, with assent of lessor, assigned to A., who, with assent of lessor, entered and paid rent to lessor. B. R. H. 343.

Nor, in an executory covenant, if it is made before the breach. Vide Accord, (A 2.)

(2 V 9.) Arbitrament.

So, the defendant may plead in bar, an arbitrament made after the covenant broken.

To covenant in a deed, (made for the performance of several matters,) the defendant cannot plead that in the deed there is a covenant, that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators to be chosen, &c. and that he offered to refer the matter in dispute, &c. but that the plaintiff refused, &c.; such a plea being holden bad on demurrer. 2 Bos. & Pull. 131.

How an arbitrament shall be pleaded, vide Accord, (D 1.)

(2 V 10.) Outlawry.

So, the defendant may plead outlawry in bar, where the breach is for a thing forfeited by outlawry; as, for non-payment of rent. Lut. 1513.

But where the breach is for not repairing, he cannot; for the damages are uncertain. R. Lut. 1513.

(2 V 11.) Release.

So the defendant may plead a release of all actions, covenants, or demands. Vide post, (2 W 30.)

So, a release of covenants or agreements in the indenture, to a bond for performance of covenants. 3 Leo. 69.

[\*]So, if a covenant be with B. his executors and assigns, in an action by an assignee, the defendant may plead a release by B. R. Cro. Car. 503. 2 Rol. 411. l. 35.

Though the release by B. be made after a breach in the time of the assignee. R. Cro. Car. 503.

But a release by B. after an action brought by the assignee, is no plea ; for then an interest in the covenant is vested in him. R. Cro. Car. 503. 2 Rol. 411. l. 30.

So, a release of actions to the covenantor before breach is no plea. D. Al. 39.

So, a release of all covenants after breach is no discharge of the bond for performance of covenants, for it was forfeited before. R. 3 Leo. 69. Dy. 57. a.

So, where a covenant is joint and several, a release of the action to one shall not be a bar as to the other. Dub. Sal. 574. [1 Ld. Raym. 420. 690.]

A discharge in nature of a release, without deed, in satisfaction of all demands, cannot be pleaded in covenant ; for covenant by deed must be discharged by deed. 2 Wils. 376.

### (2 V 12.) Defeasance.

So, the defendant may plead in bar a defeasance of the covenant. Vide post. (2 W 35.)

As, a subsequent covenant, which discharges this. Vide Defeasance.

Or, a covenant that he will not sue the defendant upon a former covenant. (Com. 139.) Adm. Sal. 574. Semb. cont. Sal. 575.

And in all cases, where the defeasance is absolute and perpetual, it amounts to a release, and shall be a good bar. R. Sho. 46.

But on a covenant by charter-party, the defendant shall not plead a breach of covenant on the other part in bar ; for one may be less damage than the other. R. 3 Lev. 41,

So, if several covenant, and the covenantee makes a collateral covenant with one that he shall not be sued, this cannot be pleaded in bar ; for it does not amount to a discharge of the prior covenant ; for it will not be to the benefit of all, but only of one. Sal. 575. (1 Ld. Raym. 688.) (Com. 139.)

So, a covenant that he will not sue for such a time. R. Sal. 573.

So, if a covenant be to give license for seven years for payment, it is no bar. R. Sho. 46.

So, sequestration of the parsonage in covenant for rent upon a lease by indenture is no bar. R. Dal. 44.

So, if A. covenants to pay 300*l.* per ann. to B. *quamdiu* he and his wife live separate, and by a subsequent deed B. covenants to indemnify A. from the payment of 300*l.* *quamdiu* he and his wife cohabit, this is no bar to the action upon the first deed ; but A. must have his remedy by covenant upon the collateral indenture, if he is sued on the first. R. 2 Vent. 218.

### [\*](2 V 13.) Covenants performed.

The defendant may plead performance generally, or a special performance. Vide post, (2 W 33.)

In covenant, or in debt upon a bond for performance of covenants, if all the covenants are in the affirmative, the defendant may plead covenants performed generally. Co. Lit. 303. b. R. Cro. El. 749. 1 Lev. 303. 2 Sand. 411. Vide ante, (E. 26.)

So, if some of the covenants are negative, but they are void in law, the [\*359]

defendant shall plead performance generally; for the court will take notice that the negatives are contrary to law. R. Mo. 856.

So, though to affirmative covenants negative words of the same import are added. 1 Sid. 87.

So, in covenant to discharge all arrears of rent, it is a good plea that he left money in the plaintiff's hands to discharge it. R. 4 Mod. 249.

If several breaches are assigned, he may plead to each. 1 Sal. 138.

But generally, where some of the covenants are negative, the defendant must plead to them specially. Vide ante, (E 25.)

So, if the covenant requires an act to be done by a stranger. Ibid.

Or, an act upon record. Ibid.

So, if a covenant be in the disjunctive, the defendant must shew what part he has performed. Ibid.

So, where the agreement is to do an act upon request, and the request is alleged, it is no plea to say, *quod paratus fuit facere*. R. 3 Mod. 295.

Yet, upon a general demurrer it shall be aided; if the defendant pleads generally, where there are any negative covenants. Vide ante, (E 26.)

If, in covenant or debt upon a bond for performance of covenants, the defendant pleads performance to the affirmative matter, alleged for breach, or to be done by the condition, it is not sufficient without shewing how, and in what particular manner he has performed it. Vide ante, (E 25.)

As, if the covenant be, that he make appear to B., it is not sufficient to say, that he made appear to B., without saying how. R. 2 Lev. 125.

That he will pay a moiety of a sum to be received, it is not sufficient to say, that he has paid a moiety, without shewing how much he received. 1 Sid. 334.

That he will pay as long as letters patent stand in force, it is not sufficient to say, they are not in force, without shewing how become void. R. Sho. 290.

So, it is not sufficient to say, that he *paratus fuit*, or *obtulit* to perform, when he takes upon himself to perform at his peril. R. 1 Lev. 191. Vide ante, (C 61.—C 75.)

But, if the condition, &c. comprehends multiplicity of matter, to avoid prolixity, performance generally has been allowed, and [\*]the other party shall be put to shew a particular breach. Vide ante, (E 26.)

As, if the condition be to pay a moiety of all sums which he shall from time to time receive. R. 1 Sid. 334.

*Sci. fa.* on a recognizance, which was conditioned for the due performance of articles entered into by A. B. Plea, that the defendants never had a counterpart of the articles; that A. B. had performed all the affirmative covenants; that they contained only one negative covenant, (stating it), which had also been complied with. The plea held bad. 1 Anst. 193.

So, if the covenant be in the negative, it is sufficient to plead generally in the negative; as, if the condition or covenant be, to indemnify, &c., the defendant may plead generally, *quod non fuit damnificatus*. Vide ante, (E 25.)

So, if to affirmative words the defendant pleads in the negative *non damnificatus*, &c. R. 2 Co. 4. 2 Cro. 363, 4. Mar. pl. 200.

So, if the condition be to free and indemnify from the charges of a suit. R. 5 Mod. 244.

But, where the covenant or condition is to indemnify from a certain and a particular thing, it is not sufficient to say, *non damnificatus* generally, but he must shew how he indemnified. Semb. 5 Mod. 244.

Performance pleaded otherwise than in the terms of the covenant, is bad even on a general demurrer. 1 Bos. & Pul. 455.

(2 V 14.) Pleas to a breach for non-payment of rent.

In covenant, if the breach be for non-payment of rent, the defendant may plead *riens arrear*. R. cont. 1. Brownl. 19. (Cowp. 588.) Acc. 2 Brownl. 273.

That the plaintiff *nil habuit in tenementis*. 3 Lev. 193. Vide post, (2 W 48.)

The defendant may plead *nil habuit in tenementis* to an action of covenant brought by the committee of a lunatic on a lease made by him as committee in his own name; for the committee of a lunatic cannot grant such a lease 2 Wils. 130.

*Nil habet in tenementis* cannot be pleaded, if the demise is by indenture. Str. 817. Ld. Raym. 1550.

That another was seised in fee before the demise amounts to *nil habet*, &c. Ibid.

*Solvit ad diem*. 2 Brownl. 273.

But, if breach be assigned upon a covenant in a lease for non-payment of a sum in gross, *nil habet in tenementis* is no plea. R. 2 Vent. 99.

To covenant for rent, the defendant may plead that before the rent became due, he assigned all the estate, title, interest, and term for years which he then had to come in the premises. Doug. 461. n.

And to this it will not be a good replication, that the assignee never took actual possession, without adding that the assignment was fraudulent or by way of mortgage, &c. Ibid.

In covenant for rent against the defendant as assignee of all the original lessee's interest, &c. by virtue whereof he became and still is possessed; if the defendant plead, that all, &c. did not come to him by assignment, and that he did not become possessed, &c. it is good evidence to support the plea, [\*] that the assignment was by way of mortgage, with a clause of redemption, and that the defendant has never taken actual possession; and this, although the mortgage be forfeited. Doug. 455.

But, evidence of an under-lease will not support such a plea. Id. 183.

Nor, evidence of an assignment of all the original lessee's estate in part of the demised premises. Ibid. in the notes.

So, levy by distress, is no plea in covenant for non-payment of rent; for this admits the rent not paid at the day. R. 2 Brownl. 273. Vide post, (2 W 47.)

It is no plea that all the estate and fortune of the lessee was transferred to trustees under an act of parliament, though a public one, if there were no words of discharge. Andr. 40. 1 T. R. 93.

In covenant for rent against an assignee, an assignment to a *feme covert* before the rent accrued, is a good plea. Dougl. 452.

That the house was burnt down, and not rebuilt by the lessor who was obliged to do it, is no plea. Str. 763. Ld. Raym. 1477. Vide 1 T. R. 310. Ambler, 619. (Com. 626.) 6 T. R. 650.

Neither can the defendant set off any uncertain damages which he may be entitled to recover against the landlord on any of the covenants in the lease. 6 T. R. 488.

Whether bankruptcy be a plea to an action of covenant for rent? Quere, 1 T. R. 86.

If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued, entered and pulled down the premises and expelled him; the plaintiff may reply that he did not expel, &c. *modo et forma*, &c. Willes, 129.

The lessee covenanted to put a house in repair before the first of June " 5000  
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slates being found, allowed, and delivered by the lessor towards the repair," and afterwards to keep it in repair during the term: the lessor assigned a breach for not keeping in repair after the first of June, and it was holden no plea to say that the lessor had not, after making the lease, found, allowed, and delivered the slates, &c. Willes, 146.

But to an action of covenant for not repairing several premises, the defendant cannot plead an expulsion by the plaintiff from part. Ibid.

{ Where the lessee covenanted to pay rent, on demand, at such place as should, from time to time, be appointed by the lessor, in covenant for non-payment of rent, plea that the plaintiff had not appointed a place, &c. is insufficient; he ought in such case to plead a tender, or a readiness to deliver the rent on the land. Remsen v. Conklin, 18 Johns. Rep. 447. }

### (2 V 15.) For not making assurance.

In covenant for further assurance, if the breach be, that counsel devised a note for a fine, which the defendant was required to acknowledge and refused, the defendant may plead *non requisivit*. Lut. 286.

Covenant to levy a fine of certain lands in the township of A. in the parish of B., on the request and at the costs of the grantee; breach assigned that the grantor refused to acknowledge a fine (tendered to him) of lands in the parish of B.; plea that the note of the fine tendered comprised other lands in B. than those contained in the covenant, of which the grantor was seised; and it was holden a good plea. Willes, 150. 7 Mod. 292. S. C.

### (2 V 16.) For not repairing.

In covenant, if the breach be for default of repairing, the defendant may plead *quod reparavit*.

That the plaintiff was to deliver timber, which upon request he did not deliver. Lut. 316.

Otherwise, if the breach be assigned in a thing which does not require timber. Ibid.

[\*] If he pleads *quod reparavit* generally, and issue thereon, after a verdict for the defendant, it shall be well. R. 2 Mod. 176.

But he cannot plead that he rebuilt. R. 2 Leo. 189.

The bankruptcy of the lessee is no bar to an action of covenant brought against him. 4 T. R. 94.

A plea of bankruptcy given by the stat. 5 Geo. 2. c. 30. s. 7. must state that the cause of action accrued before the bankruptcy; stating that an indenture on which the action is founded, was executed prior to the bankruptcy, is insufficient. 4 T. R. 156.

If the breach be, that the tenements were not of such yearly value, the defendant may plead that they were. Lut. 289.

If the breach be, that a stranger had title, the defendant shall plead that he had not. Lut. 322.

In covenant for quiet enjoyment, a plea that for the first half-year of plaintiff's lease the plaintiff might have enjoyed, &c.; but that for non-payment of the rent for twenty-one days after that half year, the defendant had a right to re-enter according to a proviso in the lease, and that he did re-enter, &c. was holden bad on special demurrer. 6 T. R. 458.

But if the breach be, that he did not lease, and the defendant says, *non habuit unde dimittere potuit*, replication, *quod habuit unde*, &c. is not good. R. 2 Bul. 41.

To covenant as heir, and breach assigned for want of repairs, on a lease for years, it is a good plea that the lessor was only tenant for life, with a traverse that the reversion was not in him and his heirs. 2 Wils. 143.

Yet, it shall be aided by a verdict, *quod habuit terras unde dimittere potuit*.  
2 Bul. 41.

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood. 6 T. R. 750.

### (2 V 17.) Judgment.

If covenant be on the word *dimisi*, &c. the plaintiff shall not have judgment for damages, but for the term. R. 2 Leo. 104.

If the defendant has judgment against him upon *nil dicit*, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages. 1 Sand. 47.

And by the st. 8 & 9 W. 3. 11. the plaintiff may suggest on the roll as many breaches as he shall think fit; on which shall issue a writ to summon a jury before the justices of *nisi prius* for that county, to try each, and what damage the plaintiff sustained by it, which writ the said justices shall return to the court from whence it issued.

In covenant if there be an issue for part, and a demurrer for part, the jury who try the issue shall also find conditional damages upon the demurrer. 1 Sand. 109.

If the issue goes to the whole, the jury shall find damages, and there shall be judgment thereon.

Where the precise sum is not the essence of the agreement, the quantum of damages may be assessed by the jury; where the precise sum is fixed by the parties, the jury are confined to it. 4 Burr. 2225.

If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the [\*]time, such weekly payments are not by way of penalty, but in the nature of liquidated damages. 2 T. R. 32.

In articles of agreement, consisting of various particulars, for the breach of some of which stipulated fines were to be paid, it was agreed by both parties that either of them neglecting to perform that agreement, should pay to the other 200*l*. This sum is in the nature of a penalty, and not of liquidated damages. 2 Bos. & Pul. 346.

Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid on breach of performance, that must be considered as a penalty. But where it is agreed, that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. Per Heath, Just. *ibid*.

And by the st. 8 & 9 W. 3. 11. the jury, besides damages and costs as usual, shall assess damages for such of the said breaches as the plaintiff shall prove broken, on which the like judgment shall be entered as formerly.

But if the plaintiff assigns several breaches, and the defendant does not rejoin, the plaintiff may sign judgment if he pleases, without a writ of inquiry awarded returnable before the justices of *nisi prius*; for he has his election to proceed upon the statute, or by the common law, and this as well where the judgment is for want of a rejoinder, as by *nil dicit* or confession, &c. (Com. 376.)

Where there is judgment for the plaintiff on demurrer in an action of debt for the penalty for non-performance of covenants in articles of agreement, the plaintiff may enter up his judgment for the penalty in like manner as before the statute; but then the judgment is to stand only as a security for the damages sustained,

and the plaintiff is not to assign the breaches till after the judgment is given, and if he should take out execution for the whole penalty, then is the time to complain. Cowp. 357.

In debt for a penalty on certain articles, the jury ought to assess damages on the breaches assigned, and if they find the whole debt, a *venire de novo* shall be awarded, for this statute was made in ease of defendants. 2 Wils. 377.

### (2 V 18.) Execution.

After the judgment in covenant there shall be the same execution as in debt.

But by the st. 8 & 9 W. 3. 11. if after judgment, and before execution, the defendant pays into court, for the plaintiff's use, the damages assessed by the jury and costs, a *cessat executio* shall be entered on record.

So, by the said st. 8 & 9 W. 3. 11. if the plaintiff be satisfied, by execution executed, his damages, costs, and the charge of the execution, the defendant's body, land and goods, shall be forthwith discharged, and the discharge shall be entered on record.

But by the same statute, such judgment shall remain as a collateral security to the plaintiff against any further breach of covenant, in which case the plaintiff, &c. may have a *scire facias* on the same judgment against the defendant, his heir, terre-tenant, executor or administrator, suggesting other breaches, &c. upon which shall be the like proceedings *ut supra* to try issues, discharge execution, &c. *Et sic toties quoties*.

[\*]So, before where there was a judgment in covenant upon a breach of covenant, a perpetual *scire facias* might have been sued upon a new breach, without suing covenant *de novo*. R. Cro. El. 3.

And covenant could not be sued afterwards upon a new breach of the same covenant. Per Manw. 3 Leo. 51.

After judgment for the plaintiff on demurrer, in debt on bond conditioned to pay an annuity, the defendant cannot take out execution for the arrears due, but must assign breaches on the record under this statute. 8 T. R. 126.

### (2 W) PLEADING IN DEBT.

#### (2 W 1.) Where it shall be brought.

Debt lies, where a man is indebted to another by judgment, specialty, contract, &c.

If a debt be under 40s. it shall be sued for by plaint in the county.

Or, by *justices* in the county. Reg. 139. a. F. N. B. 119. l.

The *justices* requires the sheriff *quod justic.* the defendant that he render to the plaintiff what he owes to him, &c. Reg. 139. a.

And the word *justices* is repeated in the writ to each debtor. Ibid.

And, by the *justices*, the county-court may hold plea in debt above 40s. 2 Inst. 312.

If it be sued in the county, the plaintiff may remove it by *pone* into C. B. without any cause, and the defendant with cause. F. N. B. 119. K.

Or, by *recordare*, if it be sued in the court of a city, borough, &c. Ibid.

If the debt be above 40s. it ought regularly to be sued in C. B. by original. Reg. 139. b.

And upon pretence of privilege by bill in B. R. 4 Inst. 71.

But, by the modern practice, debt may be sued in B. R. by original. B. R. H. 317.

## (2 W 2.) What Process.—Summons.

Process in debt by the common law was only a summons. 3 Co. 12. a.

By the st. 25 Ed. 3. 17. like process was given in debt as in account, which by the st. W. 2. 17. was a *capias*, and so to outlawry. Ibid. 1 Brownl. 50.

The original or summons in debt is by a *præcipe quod reddat*. Reg. 139. b.

And it shall be in the *debet* and *detinet* for money, but for chattels, or by or against an executor, it shall be in the *detinet tantum*. F. N. B. 119. M. Vide ante, (2 D 1.)

The original ought to name the parties by their proper names, and give an addition to the defendant. 1 An. 39. Vide Abatement, (E 18, &c.—F 17, &c.—F 22, &c.)

It ought to be without rasure, or false Latin, and agreeable to the form of the register. Vide Abatement, (H 1.)

[\*]And if there be a defect in the writ, *teste*, or return, it may be pleaded in abatement, or assigned for error. Vide Abatement, (H 1, &c.)

The original may be returnable two or three terms after the *teste*. Dy. 175. a.

The sheriff returns upon the original, *pledg. de pros. et quod sum*. Kit. 257.

Or, *nihil habet per quod sum. potest*; or, if the defendant be a clerk, no lay fee *per quod*, &c. Ibid.

The summons ought to be fifteen days before the day of the return. Kit. 257.

## (2 W 3.) Capias.

If the defendant does not appear upon the return of the original, a *capias* issues. Reg. Jud. 1 b. Off. br. 22.

If he does not appear, nor is taken upon the *capias*, an *alias capias*, and afterwards a *pluries capias*, issues. Reg. Jud. 1 b. Off. Br. 23.

And, if the sheriff returns upon the *capias* that the defendant *latitat in al. com.*, a *testatum capias* to the sheriff of such county. Off. Br. 23.

By the common law a *capias* does not lie, except in actions supposed to be done *viet armis*. 3 Co. 12. a.

Or, for the king's debt. 3 Co. 12. b.

By the st. of Marl. 23. and W. 2. 11. it was given in account, and by the st. 25 Ed. 3. 17. in debt. 3 Co. 12. a.

The *capias* ought to be tested at the return of the original, the *alias* at the return of the *capias*, and the *pluries* at the return of the *alias*. Comp. Att. 7.

It ought to be returnable in the next term after the *teste*. D. Cro. El. (467.)

The *capias* ought to be conformable to the original, and the *alias* and *pluries* to the *capias*.

And therefore, if the original is A. *de* B. and *capias* is A. *nuper de* B. it is error. R. 2 Cro. 576.

If the original be Launcelot, and the *capias* Lancelot. Semb. Cro. El. 50.

If the one be A. B. alderman, the other armiger. R. Yel. 120.

An outlawry is valid, though it do not appear that the *capias* and *exigent* were under the seal, but only signed by the justices of oyer and terminer. 4 T. R. 521.

The st. 25 Edw. 3. s. 5. c. 14., which requires that the second *capias* against a party indicted, shall require the sheriff to seize as well his chattels as his body, does

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not apply to courts of oyer and terminer and gaol delivery, since the writ is to be returnable in three weeks, when such court will not be sitting. 4 T. R. 521.

(2 W 4.) *Exigent.*

If the defendant is not taken, or does not appear upon the return of the *pluries capias*, an *exigi facias* issues. Reg. Jud. 2. a.

A plaintiff cannot proceed to outlawry in the exchequer, the court having no process on which to found such a proceeding. 1 Price, 309.

[\*]By the st. 31 El. 3. in all personal actions, a writ of proclamation shall be made out upon every *exigent* of the same *teste* and return, and delivered to the sheriff of the county where the defendant then dwells, who shall thereon make three proclamations, the first at the county court, the second at quarter sessions, and the third a month before the *quinto exact.*, at the church door where the defendant dwells, &c. and all outlawries otherwise had shall be void.—So, by the st. 6 H. 8. 4.

In criminal cases no proclamation is necessary to outlawry, after judgment. 3 T. R. 503.

If a writ of proclamation require the defendant to render himself (not to the justices, &c. but) to the sheriff, (as it may) so that he might have his body before the justices, &c. at the next sessions of oyer and terminer, it is the duty of the defendant to render himself to the sheriff before the fifth county court; so that an outlawry after that time, and before the next sessions, is valid, since when given the defendant had no future day for surrendering. 4 T. R. 5.

A writ of proclamation, requiring the sheriff to proclaim the defendant in "open court, in the sheriff's county," means in his county court, and is therefore sufficient. 4 T. R. 521.

If it appear by the writ of proclamation and return thereon, that an outlawry for felony was pronounced before the day of appearance given to the party, it is erroneous. 8 T. R. 499.

The st. 31 Eliz. c. 3. requires "one other of the said proclamations to be made at the general quarter sessions of the peace, in those parts where the party defendant, at the time of the exigent awarded, shall be dwelling." By "in those parts" is meant county, riding, or division. A writ of proclamation, therefore, requiring proclamation to be made at the general quarter sessions of the peace to be holden for the said sheriff's county, is good. 4 T. R. 521.

The sheriff's return to a writ of proclamation, stating that he had proclaimed the defendant at the church door of the parish of Y., in which the writ states that he is inhabiting, is sufficient, though it do not add "where he is inhabiting." 4 T. R. 521.

The sheriff in his return to the writ of proclamation, need not state that the defendant did not appear, though he must in that to the writ of *exigent*. 4 T. R. 521.

The *exigent* shall be conformable to the original and *capias*.

And therefore, if it be a *testatum capias*, an *exigent* does not lie thereon in the last county, without an original *capias* there. Dy. 295. b.

The *exigent* shall have such return, as that five county-courts may intervene between the *teste* and return. Comp. Att. 13.

And if there are not five county-courts before the return, an *exigent de novo allocat.* 4 com. issues. Reg. Jud. 21. b. 61. b. Kit. 264. a.

So, if another person of the same name with the defendant appears upon the *exigent*, the plaintiff may have an *exigent de novo* against the defendant. Off. Br. 80.

But the *exigent allocat. com.* must be executed at the next county after the fourth: for, if by any accident the fifth county intervenes, it will be error. Pl. Com. 371. b.



So, proclamation must appear to be made at the county-court held *pro com.*, for *in com.* is not sufficient. R. 1 Vent. 108. R. 3 Mod. 89.

[\*]Return of proclamation, "that they were made as by the writ commanded," good. Semb. Barnes, 322.

If there are several, it must be said, *quod nec eorum aliquis comperuit*. R. 3 Mod. 90.

If the defendant appears upon the *exigent*, the sheriff may return a *reddidit se*. Kit. 264. n.

So, if one of the defendants appears he may return so for him, and proceed against the others. Kit. 264.

So, if one defendant dies. Kit. 264. b.

If the defendant appears upon the *exigent*, he may have a *supersedeas* to the sheriff.

*Supersedeas* to the *exigent* should be delivered to sheriff before return. Barnes, 319.

Whilst the writ remains in sheriff's hands, though after the return, a *supersedeas* may be allowed on costs. Barnes, 323.

If defendant becomes a prisoner after the *teste*, and before the return of *exigent* on *ca. sa.* proceedings shall be staid. Barnes, 321.

If the sheriff proceeds after *supersedeas* to outlawry, it will be error. Yel. 57. R. Mo. 73.

So, it will be error, if the outlawry be pronounced on the same day the *exigent* bears *teste*. R. 2 Cro. 660.

If there be no return to the *exigent*. R. Dal. 68. 1 And. 36.

Or, the name of the sheriff be not added to it. Dub. Dal. 68. Leo. 139. Semb. Hob. 70.

But it is no error in an outlawry, after judgment, if there be no proclamation in the county where the defendant inhabits. R. 2 Cro. 577.

So, an outlawry shall not be reversed for default of proclamation in the county where the defendant dwelt, till issue taken thereon and tried. R. 1 And. 36. [Vide Utlagary.]

### (2 W 5.) Outlawry upon it.

If the defendant upon the *exigent* being *quinto exact.* makes default, there shall be judgment *quod utlaget*. Kit. 263. b. [Vide infra, Utlagary, (C 1.)]

And the outlawry shall be by judgment of the coroners. R. 2 Rol. 805. l. 35. R. 2 Cro. 521.

Therefore in a county in which there is no coroner, there can be no outlawry. Ld. R. 591.

If there are several defendants, the judgment shall be *quod utlagentur*.

If defendant be a woman, it shall not say *quod utlaget.*, but *quod waivent.*, otherwise it is error. R. 2 Cro. 358. Vide Utlagary (A).

But a return of the coroners, that he was outlawed upon a *certiorari* to them, does not conclude; for it does not belong to them. Dy. 223. a.

So, in every case, where the entry varies from the legal form, it will be error: as, if it does not appear that the county-court was held *pro com.* R. 3 Mod. 89. R. 2 Rol. 802. l. 30.

Or, if it be in *hustingis*, without saying, that it was in *hustingis de communibus placitis*. Cro. El. 50. 2 Rol. 803. l. 10.

So, if the *quinto exact.* &c. be entered the day of the *teste* of the *exigent*. R. 2 Cro. 660.

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Or, there are only fourteen days between the two counties upon the return of the *exigent*. R. 2 Rol. 802. l. 42.

[\*]If there are several defendants, and the entry is *non comparuerunt*, without saying, *nec eorum aliquis*. R. 2 Cro. 358. 2 Rol. 490. 2 Rol. 802. l. 25. Cro. El. 50. 3 Mod. 90.

If the year is mentioned to the *quarto exact.*, though it be to the *tertio* and *quinto*, by which it may appear to be the same year. R. 2 Rol. 803. l. 25.

If it be *ad comital. tent. primo M. anno regni domini nostri Jacobi*, omitting *regis*. R. 2 Rol. 802. l. 45.

Or, *domini regis*, omitting the king's name. R. 2 Rol. 802. l. 50.

Or, omitting *regni Angliæ*. R. 2 Rol. 803. l. 5.

If the outlawry be *per judicium coronatorum*, without naming the coroners, except in London. R. 2 Rol. 802. l. 37.

But, in London naming the coroners is not usual. R. 2 Rol. 802. l. 45.

So, *quinto exact. ad fest. S. Pauli 1653*, without saying A. D. is no error. R. Hard. 6.

So, in London fourteen days between two hustings will be well; for the hustings may be held every week. 2 Leo. 14.

In a record of outlawry, it is necessary to state the year of the king's reign in which every transaction happened, though in other records it is not; hence an outlawry was reversed, because, in the sheriff's return to the *exigent*, the year of the fourth exaction was not stated. 5 T. R. 202.

If it appear by the return of the sheriff on the record of outlawry, that the writ of proclamation was delivered to him three lunar months before its return, it is sufficient, though not expressly averred. 4 T. R. 521.

The record of an outlawry need not allege that the defendant did not come in before the *exigent* was awarded. 4 T. R. 521.

An averment even in a record of outlawry, that the sheriff was commanded to take the defendant, to exact him, or otherwise, is a sufficient averment that a writ of *capias*, of *exigent*, and so forth, was issued against him. 6 T. R. 573.

The names of the coroners by whom the outlawry is pronounced need not be subscribed to the outlawry; since all that is requisite is, that it appears by whom the outlawry was pronounced, and that they had authority so to do. 4 T. R. 521.

If in the record of an outlawry it is averred that one sheriff executed the *exigent* and another returned it, and the duration of time between the *quinto exactus* and the return does not exceed a year, it will be intended, though not averred, that the sheriff who made the return was the successor of him who executed the writ. 6 T. R. 573.

### (2 W 6.) *Capias utlagatum*.

After outlawry returned, the plaintiff shall have a *capias utlagatum* against the defendant. Vide Utlagary, (D 5.)

*Capias, alias, & pluries*, may issue all together in order to an outlawry. And no affidavit for bail is required, nor any date to the writs. Barnes, 322.

Or, special against him, his goods, and lands.

And thereon an inquisition shall be taken and returned.

In K. B. the writ of *capias utlagatum* and the sheriff's return to it, ought to be filed in the office of the clerk of the exigents and outlawries; and not in the treasury chamber. 3 T. R. 578.

Yet, by the st. 4 & 5 W. & M. 18. a defendant taken upon a *capias utlagatum* shall be discharged on his attorney's signing an appearance, or, if special bail required, on bond, &c.

[\*]If *capias utlagatum* recites a special original, specially expressing the cause

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of action, the sheriff must take special bail, though the *capias utlagatum* is not marked for bail. 3 B. M. 1482.

Process of outlawry is not within 12 G. 1. c. 29. Ibid.

Defendant cannot reverse outlawry, without giving such bail as the law requires. Ibid.

If the defendant be taken upon a *capias utlagatum*, the plaintiff cannot declare against him; for the process is determined. Dy. Cro. El. 706, 7.

But he may have a new action of debt against him. D. Cro. El. 707. 5 Co. 88. a.

Or, may reverse the outlawry for error. 1 Bro. Ent. 215, 216.

By the st. 31 El. 3. none shall be admitted to reverse an outlawry for want of proclamation, unless he put in bail to answer the plaintiff on the same cause of action, and to answer the condemnation also, if the plaintiff begin suit before the end of two terms next.

If the case originally required special bail, and defendant stands out to an outlawry, he cannot come in and appear to the outlawry, without putting in special bail, and the filacer shall not issue a *supersedeas* till then. 3 B. M. 1920.

So, if the reversal be for other defect, when the debt and damages amount to upwards of 10/. Com. Att. 16.

So, if the reversal be of an outlawry in ejectment, &c. 2 Rol. 490.

If the plaintiff proceeds to an outlawry, when the defendant was in prison upon the *capias*, he shall reverse it at his own charge. 2 Vent. 46.

Or, if the plaintiff knew that he was in prison in another action at his suit. Sal. 495.

Or, if the defendant appears publicly, it shall be so in B. R. otherwise in C. B. Sal. 495.

After outlawry reversed, the defendant ought to appear and accept a declaration within two terms next. Vide ante, (C. 4.)

If the outlawry was in London, &c. the plaintiff may afterwards declare in another county. R. Lev. 245.

If the plaintiff does not declare within two terms after notice of the reversal of the outlawry, the defendant shall have costs to be taxed by the prothonotary.

After outlawry reversed, the plaintiff may declare upon the first or upon a new original, for by the outlawry the first was determined. Jon. 442.

Yet they may, on extraordinary grounds either for or against him, but are not bound to do it. Per Mansfield C. J. *cæteris non assentient. ut videtur*. 4 Bur. 2527.

Nor, will the court bail him by their discretionary power, without consent of prosecutor, though a writ of error is allowed. Ibid.

For such custody is in execution; not for security only, but in part of punishment, and will be considered in the final judgment; and if the outlawry is reversed, defendant must continue in custody on the conviction. Ibid.

Arrest on *cap utlagat.* is bad on Sunday. Barnes, 319.

On plaintiff's death, and no administration, prisoner on *cap utlagat.* shall be discharged. Barnes, 366.

Prisoner on *capias utlagatum* discharged by insolvent act, cannot be taken on a new *cap. utlagat.* Barnes, 378.

[\*](2 W 7.) Declaration in debt.—Must shew the certainty of the debt demanded.

A declaration in debt is founded upon a specialty, or judgment, or contract.

In all actions for debt, the declaration must shew the certain sum de-  
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manded ; and therefore, if the contract is contingent, or depends upon divers particulars, the declaration shall demand a sum certain. Vide ante, (C 21.)

If the declaration be upon several bonds or contracts, what is due upon both shall be demanded in one entire sum. Yel. 81. 3 Leo. 119.

If it be for arrears of an annuity granted for years, it must be for such a sum, without saying *de annuali redditu*. R. Yel. 208. 1 Bul. 151.

Declaration, *quod pro diversis debitis et mercimon. concessit solvere*, is not good. R. 2 Rol. 332.

If the contract be for foreign coin, the safest way is to declare *quod reddat* 20*l.* certain, or whatever other sum, and then shew the contract for so much foreign coin, which *atting. ad 20*l.* monet. Angl.* R. 2 Cro. 88. Yel. 80. Mo. 775.

And this in debt by bill as well as by original. R. 2 Cro. 88.

If a man binds himself in a bond to pay so much Flemish, &c. the plaintiff may declare, *quod reddat* so much as it amounts to in English coin. R. Yel. 81. 135. 2 Cro. 617. Jon. 69.

If a man is bound to pay 6*l.* at H., and debt is brought for 5*l.* the value of the coin there, without more, if the defendand demands *oyer* of the bill, and then demurs, there shall be judgment for the defendant. R. 2 Bul. 154.

And where the contract is for foreign coin, the plaintiff has his election to demand such coin, or as much as it amounts to in sterling. R. 1 Leo. 41.

If there be a sale of goods for two jewels, two diamonds, &c. in certain, the declaration may demand the jewels, &c. 1 And. 118.

Yet, if debt be for so much *monet. Flanar. ad valor. so much monet. Angl.*, it is well. R. Cro. El. 536. Mo. 704.

But then the jury ought to inquire of the value, or a writ of inquiry must issue before judgment. Cro. El. 536. 2 Cro. 617. [Vide supra Pleader, (Z).]

So, if the contract be for 20*l.* to be paid in goods, without saying what, in certain, it must demand the 20*l.* not the goods. R. 1 And. 118.

If the contract be for 100 guineas, he may declare for so much as they are valued for. Dub. Skin. 573.

If debt be for a certain sum, and the particular contracts whereon the plaintiff declares, amount to more, it is bad ; for he has judgment for more than he demands. R. Yel. 5. Vide post, (2 W 14.) ante, (C 84.)

If the plaintiff in the beginning of his declaration in an action for a simple contract, demands more than the sums mentioned in the several counts amount to, and calls the sum in each count parcel of the sum demanded, specifying it, and assigns for breach that the defendant has not paid that [\*]sum or any part of it, no objection can be taken to the declaration upon a special demurrer. 1 H. Bl. 249.

In debt upon a specialty the plaintiff may recover a less sum than he demands. Ld. R. 814.

Thus, in debt upon a covenant to pay so much for every hundred stacks of wood, where the plaintiff demanded by his declaration payment for 850 ; the court held him entitled to recover for the 800. Ld. R. 814. P. C.

So, if he declares for so much due, and demands a less sum without shewing that the residue is discharged. Vide ante, (C 84.)

It is no objection, that the aggregate of the sums demanded exceeds that in the recital of the writ. 11 East, 62.

So, if he declares upon several contracts, and shews part satisfied, but does not say on which contract, and he cannot recover upon all the contracts, he shall recover for no part. R. Cro. El. 583.

So, if the debt be founded upon record or specialty, and he demands a less sum than was due by the specialty, without shewing the residue satisfied; as, if 80 shillings are demanded upon a judgment in an inferior court, where the judgment was for 80 shillings and four-pence. R. 3 Mod. 41.

On a certificate of the commissioners of army-debts for 105*l.* 18*s.* 7*d.* farthing, the demand (which it was necessary by the statute to make) had been made for 105*l.* 18*s.* 6*d.* farthing, and plaintiff was nonsuited. Bunb. 166,

But debt for 50*l.*, and a declaration upon a bill to pay 50*l.* viz. ten pounds at five several days, and ten pounds *nomine pænæ*, is well; for it is a several bill as to the *nomine pænæ*. R. Cro. El. 771.

So, in debt upon several bonds, if he shews part satisfied, it is sufficient, though he does not say upon which bond. R. 3 Bul. 244. 1 Rol. 423.

So, it is sufficient, if he declares for a debt of 50*l.* though part be satisfied before action. 1 Vent. 135.

So, in debt upon a statute, &c. if the declaration be *quod cum*, &c. it is well. R. Sho. 337.

A mispleading of the averment in debt "whereby an action had accrued, &c." is a ground for special demurrer. 1 B. & P. 58.

An *indebitatus* count in debt for goods sold and delivered, in the general form, is sufficient. 2 T. R. 28.

### (2 W 8.) When in the *debet et detinet*.

So, a declaration in debt, generally, shall be in the *debet et detinet*.

Though it be against husband and wife for the debt of the wife *dum sola*. R. 3 Leo. 206.

Though debt be for guineas or foreign coin of so much value English. R. Lut. 488.

But where debt is brought for goods and chattels it may be in the *detinet* only.

As, in debt *quod reddat dolium ferri*. Yel. 71.

*Quod reddat* so many *quarteria frumenti*. 2 Cro. 88. 4 Leo. 46. 11 H. 7. 5. b.

So, if it be for foreign coin. Mo. 704. Yel. 81. R. Latch. 84. R. 2 Cro. 617. R. Latch. 5. Jon. 69.

Or, for guineas in specie. 4 Mod. 410. Lut. 488.

[\*]So, in debt by or against an executor. Vide ante. (2 D 1.—2 D 2.)

But upon an original in debt the plaintiff cannot declare in annuity. R. Yel. 208.

And therefore, if the declaration is *quod redat 50*l.* de annuali reddit,* and shews the grant of an annuity, it is bad. Yel. 208.

So, a declaration in B. R. *de placito debiti quod reddat ei 20*l.** without saying, *quas ei debet et injuste detinet*, is bad. R. Mod. Ca. 306.

So, the assignees of a bankrupt are allowed to sue both in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law. 2 T. R. 45.

### (2 W 9.) Declaration upon a bond, &c.

If the plaintiff declares upon a bond, or other specialty he must shew the certainty of the bond, &c.

And therefore, if he says *per scriptum concessit*, without saying *per scriptum suum obligatorium*, it is bad. Semb. Cro. Car. 209.

Or, *per scriptum manu sua signal*. Semb. 3 Lev. 234.

But, *per scriptum suum obligatorium* is sufficient, without saying *sigillo* [\*372]



*sigillat.*, for *scriptum obligatorium* implies it. R. Cro. El. 737. R. 2 Cro. 420.

And if he omits *per scriptum obligatorium*, after plea upon *oyer quod solvit*, &c. it shall be aided. R. Cro. Car. 209.

So, after plea of privilege, and a demurrer thereto. Lut. 1667.

So, *per scriptum obligatorium* is sufficient, without mention of the date, or seal, or delivery. R. Mod. Ca. 306.

So, *per scriptum obligatorium cujus dat. est eisdem die et anno*, though it has another or void date, for *cujus dat.* shall be construed of the delivery, otherwise if it was *gerentem* such a date; for then the true date shall be set out. R. Sal. 463.

If the bond upon *oyer* appears to be, I A. stand bound in 16 pounds, and is to be paid to B.'s executors, it is good, without saying to whom bound. R. 3 Lev. 21.

If the whole substance of the bond, &c. be in the declaration, it is not necessary to mention words, underwritten, or indorsed. R. 2 Brownl. 98.

The plaintiff may declare upon several bonds in the same declaration. Vide Action, (G).

So, he may declare upon a bill for payment of money on a day with a *nomine pænæ* for non-payment, and afterwards declare for the *nomine pænæ*. R. Cro. El. 771.

So, he may declare upon a penal bill, though it be not formally expressed. R. 2 Vent. 106.

If the declaration is insufficient, or upon *oyer* appears not sufficient, the defendant may demur. Vide Ante, (Q 3.)

To an action of debt on bond the defendant prayed *oyer* of the condition, which was "for the payment of 100*l.* by instalments till the said sum of 100*l.* be paid;" and then pleaded *non est factum*. The word "hundred" had been omitted in the second place, where it occurs in the condition, and was afterwards inserted without the defendant's knowledge. Held, that though this alteration did not avoid the instrument, yet it made such a variance between the *oyer* and the condition, as precluded the plaintiff from recovering. 1 Mars. 214. 5 Taunt. 707.

[\*]The breach may be assigned in the words of the condition; thus, in the case of a bond to perform an award, the assignment may be in the words of the award generally. 1 Price, 109. < Vide Hughes v. Smith, 5 Johns. Rep. 163. Smith v. Jansen, 8 Johns. Rep. 86. 2d. edit. >

Assignment of breaches in debt on bond to perform an award in the words of the award generally, held sufficient, although the plaintiff did not shew that performance might have been effected, or that the defendant had become enabled to carry it into effect, by the circumstances having taken place on which it was to have been performed, the award being held to assume that they had. And the fact of such circumstances not having taken place, if they lay properly within the defendant's knowledge, should be pleaded and set out by him. 1 Price, 109.

Unless in the single case of debt for rent, where a deed is the foundation of the action, it must be specifically declared on. 1 N. R. 104.

< Or in case of a bond, with condition to free land from all legal incumbrances, &c. as the plaintiff must shew an existing incumbrance. Julliard v. Burgott, 11 Johns. Rep. 6. >

It is a rule in pleading, that a party may state a deed, and leave it to the court to determine what its operation is. If the legal operation of the deed is mistated, the plea is bad; but if the deed is only stated without its legal operation, it is good. 2 H. B. 4.

In debt on bond, with a condition for the doing of any thing else but the payment of a gross sum of money, or the appearance of the defendant in a bail-bond, or replevin bond, where the action is brought by the assignee of the sheriff, the plaintiff

is bound to suggest breaches on the roll, in pursuance of stat. 8 & 9 W. 3. c. 11. s. 8.; therefore in debt on an annuity bond. 8 T. R. 126.

A bond for payment of money by instalments yearly, with a separate agreement that the forfeiture of the condition is not to extend to accelerate the payment, is within the stat. 8 & 9 W. 3. c. 11. s. 8. 2 Smith, 663. 6 East. 550.

A bond conditioned to perform an award is within 8 & 9 W. 3. c. 11. 6 East, 613. 2 Smith, 666.

The stat. 8 & 9 W. 3. c. 11. s. 8., relative to the suggestion of breaches in actions for penalties, is compulsory on the plaintiff, who therefore cannot proceed at common law by entering judgment for the penalty, without suggesting breaches, and assessing damages thereon. 5 T. R. 538. Id. 540. 636. 2 Smith, 666. 6 East, 613.

A jury may assess damages under st. 8 & 9 W. 3. c. 11. though the breach (here a single one,) is not assigned by the term "according to the form of the statute." 13 East, 1.

A suggestion to the breach of the condition of a bond, under st. 8 & 9 W. 3. c. 11. s. 8. cannot be introduced as part of a replication which is complete without it. 2 N. R. 362.

In debt on bond a replication which denies the defendant's averment of performance, and concludes to the county, and then assigns breaches, is bad on demurrer; and if the defendant, instead of demurring, take issue and go to trial on the question of performance, a repleader will be awarded after verdict. 1 Mars. 95. 5 Taunt. 386.

If, in debt on bond, the defendant plead *non est factum*, the plaintiff may suggest breaches on the roll pursuant to the statute 8 & 9 W. 3. c. 11. s. 8. 8 T. R. 255.

In debt for a penalty in articles, the jury ought to assess damages upon the breach assigned, pursuant to the statute, and must not find the debt. 2 Wils. 377.

Where it was apparent on the record that a writ of inquiry, under st. 9. & 10 W. 3. c. 11. after judgment for the plaintiff on *nul tiel record*, was necessary, he was permitted after error allowed. to execute it, and sign a new judgment; the defendant consenting, on the terms of paying costs, and placing the defendant *in statu quo*, &c. 14 East, 401.

[\*] In debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the st. 8 & 9 W. 3. c. 1. though it will only stand as a security. Cowp. 357.

Where on judgment by default in debt on bond, judgment for the penalty is taken, and afterwards a second judgment entered for the damages assessed on the inquiry, such second judgment is erroneous. 3 B. & P. 607.

Execution shall not be levied on an annuity bond, and judgment for the whole penalty, but only for the arrears of the annuity, and the judgment stand as a security for future arrears. 2 Blk. 1111.

In a judgment on a bond to pay an annuity, if a *si. fa.* be sued out, and marked for only part of the penalty, and new *si. fa.* for subsequent arrears cannot be taken out without a *sci. fa.* under st. 8 & 9 W. 3. c. 11. 2 Blk. 843.

< If, in debt on bond, conditioned to pay several sums of money, on several days, the plaintiff assign two several breaches for the non-payment of two several sums, it will be bad on special demurrer. Taft v. Brewster, 9 Johns. Rep. 334.

So, the plaintiff may declare generally for the penalty, and assign breaches in his replication. Postmaster General v. Cochran, 2 Johns. Rep. 413. Per KENT, Ch. J. But the plaintiff may select to assign breaches in the first instance. Ib. Vide Munro v. Alaire, 2 Caines' Rep. 320.

A declaration commencing in debt, and concluding with an assignment of breaches, as in covenant, is good. Gale v. O'Bryan, 12 Johns. Rep. 216. Vide Gale v. O'Brian, 13 Johns. Rep. 189. >

(2 W 10.) Upon a statute, recognizance, &c.

When it lies, vide Dett, (A 3.)

If the plaintiff declares upon a statute, recognizance, &c. he must shew the certainty of the statute or recognizance. Ash. Ent. 223. Rast. 189. a.

{ So, the condition must be set forth, and breaches alleged. Bridge v. Ford, 4 Mass. Rep. 641. }

And therefore, if he declares *quod A. coram Ch. J. concessit se teneri, &c. et si defecerit, concessit per idem scriptum quod curreret super se pœna in stat. stap.*, without saying *per scriptum suum obligatorium*, or *secundum formam statuti*, it is bad. R. per three J. Cro. Car. 363.

So, if the declaration does not shew the statute to have such seals as the act directs, it will be bad. Mo. 811.

But, if the jury find that A. *recogni se debere*, &c. without saying, *per scriptum obligatorium*, or *secundum formam statuti*, it is sufficient. R. 4 Co. 65. b.

So, if the statute be recited, as inducement to the action, it is sufficient though it is not said that it was *sub sigillo*. R. Mo. 811.

On a recognizance against bail, must shew at whose suit defendant became bail, and for what sum the suit was brought. 1 Wils. 284.

If it do not appear on the record that there is a condition to the recognizance, on which an action is brought, the court will not intend that there is any condition. Willes' Rep. 18. Barnes, 339. S. C.

(2 W 11.) Upon a contract.

When it lies, vide Dett, (A 8.)

So, if the plaintiff declares upon a contract, he ought to shew the certain contract, where the contract is express; as, upon a *mutualus* or account. Bro. V. M. 162.

Upon a sale or other agreement executory. 1 Bro. Ent. 160. 165.

For a salary upon a retainer. 1 Bro. Ent. 176. Bro. V. M. 166, 7.

For Fees. 1 Bro. Ent. 172. Vide Attorney, (B 18.)

Upon a submission to an award without specialty. 2 Sand. 127. Vide Arbitrament, (I 1, 2, 3.)

So, if the contract is only implied by the law, the plaintiff by his declaration ought to shew the foundation of the contract.

As, in debt for an escape, the plaintiff shall shew the judgment, execution, and commitment thereon. 2 Sand. 98. 2 Bro. Ent. 59. 3 Lev. 390. Vide Action on the case for Negligence, (A 2.)—Vide Ante, (2 P 1.)

[\*]For a penalty of a by-law, must shew a power to make by law made, and breach. 2 Vent. 243. 1 Bro. Ent. 170.

The first count in a declaration in debt for a penalty under a by-law set forth the charter, empowering the company to make by-laws, the by-law made, and the breach of it; the second count, omitting the above particulars, stated the penalty as being forfeited, "under and by virtue of a certain by-law of the company before that time duly made," &c. and this count was on special demurrer holden bad. 1 Bos. & Pull. Rep. 98.

For, a fine of a copyhold, a custom for the fine, and admission to copyhold. Clift. 244. Lut. 597. Vide Copyhold, (H 6.)

For a fine or amercia:ment, in a court leet, the plaintiff must shew a power to hold the leet, the offence, and the fine or amercia:ment for it. Lev. Ent. 62. 1 Bro. Ent. 152. 154. 168.

## (2 W 12.) Upon a judgment.

If the plaintiff declares upon a judgment, he must shew the certainty of the judgment. Vide ante, (E 18.)

As, if the declaration be in C. B. upon a judgment in B. R., he must shew the term and parties, and thing recovered. 2 Mod. Int. 224, 5. Lut. 600.

So, if it be upon a judgment in the same court. 2 Mod. Ent. 223, 4.

And if it be upon a judgment in C. B., he must also shew before what judges.

So, if it be upon a judgment in an inferior court. 2 Mod. Int. 228. Carth. 86.

So, the plaintiff must aver that the judgment stands in full force. Semb. Lut. 600.

But in debt upon a judgment, the plaintiff need not shew all the proceedings at large. Semb. Cro. El. 817.

Though it be upon a judgment in an inferior court. 2 Mod. Int. 229. R. Sho. 71. Carth. 86. Vide ante, (E 18.)

On a judgment of nonsuit in an inferior court, it is not necessary to set forth that the plaint in the court below was levied for a cause of action arising within its jurisdiction; nor is it necessary to set out the plaint and subsequent proceedings; it is enough if the nonsuit is laid to be given and recorded at a court held within its jurisdiction. 1 Wils. 316.

It is not necessary to shew (except in the case of an executor or administrator) more than the judgment. Per Rule, 1654. Mills, 27.

Nor, in a declaration against an executor or administrator upon a judgment, more than the declaration and the judgment upon it. Ibid.

It is not necessary to say *prout patet per recordum*. Sal. 565.

So, if the plaintiff does not shew who were the judges of the court, it will be aided after verdict. R. Carth. 86.

An action of debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. Dougl. 1. 4 T. R. 493.

The defendant however may go into the consideration of it. Ibid.

[\*](2 W 13.) Pleas.—*Nul tiel record, nil debet, &c.*

To debt upon judgment in any court of record, if there was no such recovery, or the record is mistaken, the defendant may plead *nul tiel record*. 3 Mod. 41. Vide post, (2 W 36, &c.)

Though the judgment was in the same, or in an inferior court. Bro. V. M. 244. Clift. 148.

So, in every case where the record is denied, the defendant shall say *nul tiel record*.

And *nul tiel record* without more, is a complete issue, if the record is in the same court. Mod. Ca. 40.

But where the record itself is shewn to the court in pleading, the defendant cannot say *nul tiel record*; for, by the *profert incuria*, it appears to the court that there is such a record; as, if letters patent are pleaded, the defendant may say *non concessit*, but not *nul tiel record*. Co. Lit. 260. a. Hard. 158.

If the defendant pleads *nul tiel record*, he shall conclude to the action. Clift. 148. { Vide *Wade v. Wade*, Cam. & Nor. 486. }

And to this plea the plaintiff ought to reply that there is such a record. Lut. 945.

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And the replication shall conclude, *prout patet per recordum*. Lut. 945. Vide ante, (E 29.)

If the record is in the same court, the replication shall pray *quod videat. per cur.*, and a day shall be given for the inspection. Lut. 945. R. Sal. 566. Carth. 517.

Or, the plaintiff may demand *oyer*. Per Holt, Carth. 517.

If it be in another court, day is given to produce it, as in B. R. Bro. R. 107. Sal. 566.

On *nul tiel record* pleaded, B. R. will not make an order for the proper officer of C. B. to attend with the record, there must be a *certiorari*. 2 B. M. 1034.

In C. B. Cl. Ass. 79.

If it be in a county palatine, there shall be a writ to the chamberlain to certify, &c. Clift. 148.

So, if it be in an inferior court, there shall be a writ to the proper officer to certify, &c. Bro. V. M. 244.

If the officer refuses to certify, there shall be a rule to do it upon pain, and if he does not, an attachment. Pal. 562.

At the day given for the record, there shall be judgment for or against the defendant, if he shews or fails of the record. Town. Jud. 72, 73.

But an immaterial variance is no failure. 3 Leo. 243. Hob. 209. Vide Record, (D.)

To debt upon a judgment in a court not of record, the defendant may wage his law, or plead *nil debet*. Vide post, (2 W 17.—2 W 44.—2 W 45.)

So, by the st. 4 & 5 Ann. 16. to debt upon any judgment he may plead payment in bar of the action.

If there is judgment for 388l. 0s. 1d. and debt is brought on it for 388l. omitting the penny, it is variance, and cannot be cured by a *remittit* of the penny, for that must be before judgment. Str. 1171.

[\*]*Non assumpsit* in debt, is a nullity. 4 Taunt. 164. But is cured by verdict on issue thereon.

Though a judgment in an Irish court of record, is a record, and may be pleaded as such, yet since it is proveable here only by an examined copy on oath, the verity of which is a question of fact for the jury to plead to it, of *nul tiel record* must conclude to the country. 5 East, 473. 2 Smith, 25.

The plea of *nul tiel record*, and 'giving a day, makes a complete issue; so that if the adverse party demurs, the other need not join in demurrer, but on failure at the day, may sign judgment. 2 B. & P. 302.

< Nil debet cannot be pleaded to an action of debt on recognizance of bail, Bullis v. Giddens, 8 Johns. Rep. 64. 2d edit.

In debt on a bond of indemnity, *non damnificatus* is a good plea. Douglass v. Clark, 14 Johns. Rep. 177.

Where judgment is rendered by default against joint debtors, and debt is brought on such judgment, one defendant who was not brought into court, in the original action, cannot plead *nul tiel record*. Dando v. Doll, 2 Johns. Rep. 87.

Under the plea of *nul tiel record*, the defendant cannot give notice of special matter to be offered in evidence at the trial. Raymond v. Smith, 13 Johns. Rep. 329. >

### (2 W 14.) Upon a demise.

If the plaintiff declares upon a demise, he must shew the certainty of the lands demised.

And, therefore, if he alleges a demise made to B., but does not say where the land lies, it is bad. R. 2 Cro. 682.



Debt will lie for use and occupation generally, without setting forth the particulars of the demise. 6 T. R. 62.

If the plaintiff be an assignee, he must shew a good assignment : as, an assignment by deed. Vide ante, (2 V 2.)

And *per scriptum*, without saying *sigillat.* or *fact.*, is not sufficient. 1 Leo. 310. Vide ante, (2 W 9.)

But default of attornment shall be aided after verdict. R. Ray. 487.

So, if he says that he is yet seised of the reversion where the term is determined. R. 2 Cro. 118.

So, it is sufficient to allege the lands demised, as general, and certain as they are in the lease. R. 2 Cro. 124.

Though no *vill* appears where the land lies, but only the county. 2 Cro. 125.

So, it is sufficient to say that the plaintiff demised, without shewing what estate he had. Sal. 562.

So, the plaintiff must shew that the defendant entered and was possessed by virtue of the demise. Semb. Cro. El. 262.

And this is necessary where the debt is for rent upon a lease at will ; for the defendant is charged in respect of his occupation. R. 1 Sal. 209.

If he shews that he was possessed *a festo Michaelis usque ad festum M.* when he demands rent for one year, it is bad ; for it wants one day of a year. Per Yel. 74.

But *virtute cujus intravit* is sufficient, without shewing the time of the entry. R. Latch, 196.

And if the lease commenced at a future day, it shall be entered that he entered after the day. R. 2 Cro. 549.

So, upon a lease for years no entry or occupation need be alleged. 1 Sal. 209.

So, if a lease begins from Michaelmas, and the entry is 29th September, which is the day before the commencement, it will be well after *nil debet*, and a verdict for the plaintiff. R. Cro. El. 169.

If a tenant from year to year hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as [\*]having been made for such a number of years. Salk. 414. cited 1 T. R. 380.

If the declaration alleges a demise *per nomen*, &c. it ought to say that it was by writing. R. 3 Leo. 9.

So, the plaintiff must shew expressly what rent is reserved ; for *secundum ratum* 20*l.* is not sufficient. R. 1 Sal. 262.

So, the plaintiff must shew when the rent was in arrear. Semb. 2 Cro. 668.

But it is sufficient, if the plaintiff says the rent was in arrear at such a day, without saying that it then became due ; for it shall be intended upon a general demurrer. R. 1 Sal. 139.

And if it be reserved at two feasts, it is not sufficient to say that it was in arrear for a year, without shewing at what feast the year expired. R. 3 Mod. 70. Semb. Sho. 9. R. Cro. El. 702.

Yet, if the declaration shews that he had possession only one year, it will be aided. R. 3 Mod. 70.

If it be reserved at two feasts, or ten days after, it is not sufficient to say that it was in arrear for ten days, but he must say after ten days. R. Cro. El. 262.

If the grantee of a reversion be plaintiff, he need not allege notice or [\*378]

attornment in the declaration ; for if he has paid, it will be a good plea ; if not, the action is a demand. R. 2 Cro. 193.

But the rent must be computed according to the day mentioned in the *reddendum*, not according to the *habendum* ; as, if a demise be to commence from the 24th December, rendering rent at Michaelmas, St. Thomas, &c. the declaration must say that the rent was due 21st December, viz. St. Thomas, not the 24th of December. R. 1 Sal. 141.

Yet, *reddendum* quarterly shall be computed according to the *habendum*. Ibid.

But if debt be for a sum more or less than the rent in demand, it is bad, except where it shews the residue discharged. Vide ante, (C 84.—2 W 7.)

As, if debt be for 100*l.* and the plaintiff declares upon a lease, rendering 74*l.* and demands for a year and a half, it is bad, if he does not shew that the 1*l.* above the 100*l.* is satisfied. Somb. 2 Lev. 4.

So, if debt be for 15*s.*, and he declares upon a lease rendering 30*s.* and demands rent for a year, it is bad, if he does not say how the 15*s.* are discharged. R. Cro. Car. 137.

Yet in debt for so much rent, upon *nil debet*, if it appears that the rent ought to be apportioned for part, the plaintiff shall recover for the residue. Per Poph. 3 Co. 24. a. Acc. 1 Sid. 6. 2 Inst. 504.

So, in debt for a quarter's rent due at the end of the term it is sufficient without shewing the residue satisfied. R. 2 Vent. 129.

So, if by his own shewing the plaintiff demands more than is due. after a verdict upon *nil debet* he may remit the surplus. 1 Vent. 49.

*Riens in arrear* is a good plea in debt for rent. Cowp. 588.

### [\*](2 W 15.) Judgment by confession, &c.

After a declaration in debt the defendant may demur.

Or demand *oyer* of the deed on which he may demur, if upon *oyer* no cause of action appears.

Or, to avoid more trouble, the defendant may give judgment by his confession.

Or, by *nil dicit*. Bro. Vad. M. 216.

Or, to avoid damages against him in writ of deceit, the attorney may plead *non sum informatus*. F. N. B. 98. 1.

But the prothonotary shall not sign judgment by confession, *nil dicit*, or *non sum informatus*, if it be not brought to him after Easter, before the first day of Trinity term, or within 20 days after the end of every other term, except where the warrant of attorney is dated after the term, and then before the essoign-day of the next term. Mills, 75.

### (2 W 16.) Pleas in debt.—Upon a bond what are good or not.

To debt what pleas the defendant may plead in abatement, vide Abatement.

In bar to debt upon a bond, the defendant shall plead in avoidance or discharge of the action.

{ The plea of *non damnificatus* to debt on bond for gaol liberties, is bad. Woods v. Rowan, 5 Johns. Rep. 42. }

### (2 W 17.) *Nil debet*.

As, the defendant may plead the general issue *nil debet* to debt upon contract, not upon bond.

And this plea is good in all cases where nothing is due at the time of the action.

So, *nil debet* is a plea in debt for an escape ; for the commitment is only inducement. Sal. 565. { Vide *Minton v. Woodworth*, 11 Johns. Rep. 474. }

In debt against an executor or administrator upon a *devastavit* after judgment against him, though mixt with record. 1 Sand. 219. R. Carth. 2.

In debt upon a specialty to pay so much as A. owes ; for it is no sum certain, but must be ascertained by averment. R. Skin. 17.

In debt for the arrears of a rent-charge devised for life ; for the will is no specialty. Hard. 332.

In debt upon a tally. Hard. 332, 333.

Though the debt is barred by the statute of limitations ; for he need not plead *nil debet infra sex annos*, but *nil debet* generally. Per Holt C. J. (Vide 1 Ld. Raym. 153.)

Or, a release be given ; for then he owes nothing. 1 Sal. 394.

And this plea ought to conclude to the country. R. 1 Sand. 283.

And the plaintiff ought to join in issue without replication. Co. Lit. 126. a.

But where the defendant has matter for his excuse or discharge, he cannot plead *nil debet*.

So, it is no plea to a penalty in an indenture to perform covenants. R. 2 Mod. Ca. 106. 323. 382.

Where matter of fact is the foundation of the action, and a specialty only inducement to it ; as, in debt for rent on an indenture, there *nil debet* is a good plea : but where the specialty is the foundation, and the fact is but inducement ; [\*] as in debt for non-performance of a covenant to accept and pay for stock, there *nil debet* is no plea. Ld. Raym. 1500. Str. 778.

So, *nil debet* is no plea to a debt by bond, single bill, or other specialty, without an acquittance. R 5 Co. 43. a. Cro. El. 455. 157. Mo. 692. R. 9 Ed. 4. 53. a. [2 Wils. 10.]

*Nil debet* is no plea to a bail-bond. Fort. 367.

Nor, to an annuity granted by deed. Hard. 333.

Nor, payment without an acquittance, and if found for the defendant he shall not have judgment. 2 Cro. 377.

If found for the plaintiff, it shall be aided by the st. 32 H. 8. Vide Amendment, (K 1.)

If *nil debet* is pleaded in a *qui tam* action, defendant cannot give in evidence a record of recovery against him for the same forfeiture by another person. Str. 701.

A set-off may be pleaded to debt on a bond, conditioned for the payment of an annuity or growing sum. 2 B. M. 820.

In an action on a bond the defendant must set forth in his plea the sum really due on the bond before he is entitled to set off any cross demand on statute 8 Geo. 2. c. 24. s. 5. and such averment is traversable. 3 T. R. 65.

Though laid under a viz. the averment being material. 6 T. R. 460.

Where a bond was given to one in trust for another, in an action brought by the trustee on the bond, the court permitted the defendant to set off a debt due from the *cestuique trust*, in the same manner as if the action had been brought by him. 1 T. R. 623.

The whole penalty of a bond cannot be set off. (And Qu. Whether under a penalty of a bond for performance of articles, which sounds only in damages, the sum really due for damage sustained can be set off?) 2 B. M. 1024.

*Nil debet* on bond may be good after verdict, though bad on general demurrer. 2 Wils. 10.

(2 W 18.) *Non est factum.*

So, to debt upon bond, &c. the defendant may say *non est factum*. Cl. Ass. 72.

And this plea is good in all cases where the bond or specialty was not executed.

Or, if it was executed, but was void *ab initio*; as, for default of capacity if the obligor was a monk, *feme covert*, &c. he may plead a special *non est factum*.

Coverture may be given in evidence upon a general *non est factum*. Ld. R. 313. Infancy cannot. D. arg. Ld. R. 313. 315. { Vide Van Valkenburgh v. Rouk, 12 Johns. Rep. 337. Per SPENCER, J. }

Where an action is brought upon a deed void *ab initio*, the defendant may plead generally *non est factum*. 4 M. & S. 338. Thus where it is void by fraud. Lofft, 457. { Vide Van Valkenburgh v. Rouk, *ut supra*. Dorr v. Munsell, 13 Johns. Rep. 430. }

A count on a deed, inoperative without a co-existing schedule, averred that the schedule was then (that is, at the time of execution) annexed and subscribed. Held, that under *non est factum*, it might be shewn that it was not. 14 East, 568.

And it ought to conclude to the country. R. 1 Sal. 274.

On *non est factum* pleaded to debt upon articles, defendant may give lunacy in evidence, and plaintiff will be nonsuited. Str. 1104.

But if the plaintiff pleads over to the special matter, it will be well. 1 Sal. 274.

If a bond is void *ab initio*, the facts which make it so may by law be [\*]averred and specially pleaded; e. g. that the bond was given to indemnify against a note given to suppress evidence on an indictment for perjury. 2 Wils. 341. 347.

Such plea shall conclude that the supposed bond is void in law, *et hoc*, &c. and therefore prays judgment, and this may be pleaded with *non est factum*. Ibid.

A special *non est factum* puts the proof upon the defendant, which, upon *non est factum* generally, will be upon the plaintiff. Mod. Ca. 218.

Where an action is brought upon a deed void *ab initio*, and the matter of avoidance is pleaded specially, the proper conclusion to the plea is, *et sic non est factum suum*. 4 M. & S. 338.

And a plea in avoidance of a bond as illegal, is good, though it does not traverse the terms (with which it is inconsistent), or otherwise expressly avoid them. 9 East, 408. Id. 416.

A special *non est factum* is now no longer necessary, and is therefore disused. 4 M. & S. 339.

So, if it was executed, but became absolutely void before the time of the action; as, if it be erased, altered, or cancelled. R. 5 Co. 119. b. Dub. Dy. 112. a. 1 Bro. Ent. 198, 199. Cont. Sav. 71.

So, if two are bound, and the seal of one is broken off, for this avoids the whole deed; though they are bound jointly and severally. Dy. 59. a. in marg.—But it shall conclude *actio non*, &c. Dal. 33.—Not his deed. Dal. 105.

So, if it was executed to the use of one who refused it or if her husband refused. 5 Co. 119. b. Dy. 167. b.

Or, was delivered as an *escrow*, to be his deed upon conditions, which are not performed. 2 Rol. 683. l. 5. 2 Bro. Ent. 82. Ray. 197. Mod. Ca. 217.—and shall conclude *actio non*, &c. Dall. 33. Dy. 167. b.

But it is no plea where the deed is only voidable; as, for infancy, *dures* or *per minas*. R. 5 Co. 119. a.

So, if it is void by act of parliament. R. 5 Co. 119. a. As by the statute of usury, &c.

If the condition of a bond is not a good one, advantage cannot be taken thereof on *non est factum*. The course is to crave *oyer* and demur, &c. 2 Blk. 1108.

Or, becomes void after action brought by accident; as, if the seal is destroyed by rats or other accident after plea. R. Dy. 59. R. Dal. 33.

So, it is no plea where the deed is inrolled upon record. 1 Rol. 862. l. 12.

Nor, to a recognizance or statute. Hard. 367.

So, a stranger to the deed cannot plead a special *non est factum*; but shall say nothing passed by the deed. 1 Rol. 188.

If the plea says *quod factum prædictum* was altered, *et sic non est factum*, it will be repugnant and bad. R. Cro. El. 800.

So, it is no plea where it was a joint bond, and the plaintiff declares upon a bond by one alone. R. 5 Co. 119. a. Sav. 92.

Where the bond was delivered to the party himself upon a condition not performed. R. 9 Co. 137. a.

Or, if the delivery to a stranger be not as an *escrow*. Dy. 167. b. Co. Ent. 145. b.

[\*]If an indenture be executed by one party only, and the other party does not execute. R. Cro. El. 212.

If the delivery, after conditions performed, is to be *ut scriptum sum*, not *ut factum*. Per two J. Morton cont. Ray. 197.

If the issue upon *non est factum* is found for the defendants, the deed may be kept in court. 1 Sal. 215.

But shall not be cancelled, nor kept upon a collateral issue. Ibid.

### (2 W 19.) *Per duress*.

So, to debt upon bond the defendant may plead *per duress*. Cl. Ass. 77. Bro. R. 200.

So, to debt for arrears of an account. R. 1 Leo. 13.

And it will be *duress*, if a man is forced to give a bond, &c. by a wrongful imprisonment. 2 Inst. 482.

As, when he was under an arrest without legal process.

Or, by the process, warrant, &c. of him who had no jurisdiction.

So, if a man arrested by a legal process be forced by tortious usage in prison. 2 Inst. 482.

But, without plea of *duress*, the bond, &c. shall not be avoided; for it is not void, but only voidable. Ibid.

{ One obligor cannot plead, that the bond was obtained of his co-obligor, by duress; but this rule does not apply to the case of the surety, where the sheriff obtained a bond from a debtor, by duress. Thompson v. Lockwood, 15 Johns. Rep. 256. }

### Replication.

To this the plaintiff may reply, that the defendant was *ad largum*, and not *per duress*. Cl. Ass. 77. Bro. R. 200.

But a man shall not plead *duress* to a deed acknowledged by him to be inrolled upon record. 1 Rol. 862. l. 15.

So, it is no plea for a surety for B. that the bond was obtained by *duress* of B. R. 2 Cro. 137.

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(2 W 20.) *Per minas.*

So, *per minas.* Cl. Ass. 72.

And menace of life, member, mayhem, or imprisonment, is sufficient to avoid a deed. 2 Inst. 483.

But menace of battery is not sufficient to avoid a deed. Ibid.

Nor, menace of burning his houses. Ibid.

Or, taking or destroying his goods: for he may recover damages for them. Ibid.

Replication.

To this the plaintiff may reply, that it was voluntary, and not *per minas.* Cl. Ass. 72.

(2 W 21.) Coverture.

So, to debt by a *feme covert*, as sole, the defendant may plead in bar, that A. and she are married. Sho. 50.

So, in debt or action upon the case, by a man against a woman. R. Ray. 395.

But in debt by husband and wife, he cannot plead *ne unques accouple*, &c. for the trial would be altered. R. Sal. 437.

[\*] (2 W 22.) Within age.

So, to debt upon bond, the defendant may plead that he was within age. Cl. Ass. 76. Ash. Ent. 273.

So, to debt on simple contract, if it was not for necessities. Vide Enfant, (B 5.)

And it shall not be intended for necessities, if it be not alleged; and therefore if the defendant pleads within age, and the plaintiff demurs, there shall be judgment for the defendant. R. 2 Cro. 560.

Replication.

In replying to a plea of infancy, the plaintiff must shew enough in the replication to maintain every part of the declaration. 1 T. R. 40.

To this plea the plaintiff may reply that the defendant *fuit plenæ ætatis et non infra.* Cl. Ass. 76.

He may reply to part full age, to the residue for necessities; though all the same day. R. 1 Sal. 223.

To within age pleaded to debt upon contract, the plaintiff may say, that the defendant was indebted to him for necessary apparel, physic, victuals, &c. Cro. El. 583.

To plea of infancy, to *assumpsit* on a farrier's bill, plaintiff must reply generally, necessities for the infant, not necessities for his horse. Str. 1101. Andr. 277.

And if there is a bill for the debt, that he was indebted for necessities, and the bill given for security of payment. Ash. Ent. 273.

And it is sufficient to rejoin, that it was not for necessities generally, without saying that the money, or any part thereof, was not for necessities. R. Lut. 241. Carth. 110.

The plaintiff may reply to a plea of infancy, that the defendant, after he attained 21, confirmed his promise; and if the defendant rejoin that he did not, the plaintiff need only to rejoin that he did, and the defendant must shew that he was under age at the time. 1 T. R. 648.

A replication to a plea of infancy, that the defendant ratified and confirmed the contract, imports that he affirmed it after he came of age. 1 M. & S. 724.

Where an infant and an adult join in a contract voidable by the infant, the adult may be sued alone; and if the non-joinder of the infant is pleaded in abatement, the plaintiff must reply his non-age, and not take issue on the plea. 3 Taunt. 307. 4 Taunt. 468.

### (2 W 23.) Statute of usury.

That the bond was given upon an usurious contract. Co. Ent. 168. b. 2 Vent. 80. Clift. 185.

And it may be pleaded, without reciting the statute. Bro. V. M. 255.

But the defendant, by his plea, must shew the usurious agreement specially, and how much more than legal interest was given. R. 3 Mod. 35.

So, he must expressly aver that the agreement was for giving day of payment, &c. R. Jon. 410.

*Quod corrupte agreeatum fuit.* Cro. Car. 501.

### [\*]Replication.

To this the plaintiff may reply *quod non corrupte agreeatum fuit.*

*Quod licite bargainavit*, with a traverse of the corrupt agreement. Cl. Ass. 324.

That it was for a lawful debt with a traverse, &c. Clift. 185.

So, on a note, plaintiff may reply that the note was given for a just debt; *absque hoc* that it was agreed *modo et forma* as defendant pleads. B. R. H. 287.

That it was a mistake of the scrivener, with such traverse. 2 Vent. 82. R. Cro. Car. 501.

So, if the defendant avers the manner of the agreement, the plaintiff may traverse the averment. Semb. Hard. 418.

To debt on bond dated 20th July, conditioned for repayment of the principal sum, with interest, at 5l. per cent. from 24th June preceding, defendant pleaded that there was a corrupt agreement between plaintiff and defendant; that the former should lend the principal sum on 20th July, to be repaid with interest from 24th June preceding, which exceeds legal interest, and that the bond was given in pursuance thereof: plaintiff in his replication traversed the corrupt agreement, and defendant demurred. Judgment was given for the plaintiff, because the demurrer admitted the non-existence of any corrupt agreement. 6 T. R. 460.

### (2 W 24.) Outlawry, &c.

That the plaintiff was outlawed. Bro. V. M. 460. R. Ow. 22. Vide ante, (2 G 4.)—Abatement, (E 2.)

So, though the plaintiff was outlawed after the action brought. 1 Sal. 178.

So, that the plaintiff was attaind of felony, &c. Bro. V. M. 252. Lut. 610. Vide Abatement, (E 3.)

And if a pardon be replied, it must be averred to be *sub pede sigilli*. 1 Bos. & Pull. Rep. 199.

That the plaintiff's testator was *felo de se*, and the defendant has paid to the king's grantee. Clift. 190.

So, it is sufficient to say *debito modo utlagat. fuit*, without shewing how. Dub. 2 Vent. 282.

But to say, *et sciend. est quod A. ullagat. fuit*, is not good. R. 1 Sid. 173.

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And it is not necessary to produce it *sub pede sigilli*, when the plea is in bar. Lut. 1514.

And it is not necessary to say, after the last continuance, that he was outlawed since the declaration. 5 Mod. 11.

But in an action against an executor or administrator, outlawry of the testator or intestate is no bar; for he may have assets not forfeited. Semb. Cro. El. 575. R. Cro. El. 851. Hut. 53.

(2 W 25.) The stat. 23 H. 6 c. 9. that it was to a sheriff, &c. *colore officii*.

To a bond given to a sheriff *colore officii*, or for ease and favour, the defendant may plead the st. 23 H. 6. c. 9. 1 Sand. 157. Dy. 119. b.

[\*]Quære. Whether this is not a private statute, and therefore must be set out? But if set forth, in a plea to an action on a sheriff's bond, a misrecital is fatal. Dougl. 94.

This statute is a public act, and the court will take notice of it, though it be not pleaded. 2 T. R. 569.

And if it appear in a declaration, by the assignee of the sheriff on such bond, that the bond is void by the provisions of that statute, the court on motion, will arrest the judgment against the defendant on a plea of *non est factum*. Ibid.

So to a bond given to the marshal of B. R. warden of the Fleet, &c. 1 Lev. 254. 1 Sand. 162. 1 Sid. 383. R. Cro. El. 66.

But the statute is no plea, except as against the sheriff, his bailiffs, or ministers; as, gaolers, &c. Cro. Car. 309.

It is no plea against a serjeant of the marshes in Wales; for he is not an officer within the statute. Semb. Cro. Car. 309.

Nor against the serjeant at mace of the house of commons. R. 1 Lev. 209. Ray. 62. R. Hard. 464. Dub. 1 Sid. 384.

Nor to a bond to an officer of an inferior court, upon an arrest out of his jurisdiction. R. Cro. Car. 309.

And therefore, if a bail-bond be not conformable to the statute in the condition, it will be void: as, if it does not say in certain before what justices, or in what court, the defendant is to appear. Dy. 364. a. in marg.

So, if it does not say in what suit; as, if it says in *placito debiti*, where the writ is in *placito transgressionis ac etiam billæ* for 40*l.* debt. Semb. 1 Vent. 233. But afterwards R. cont. for it is sufficient that the condition shews the time and place of appearance, and in what suit. 2 Jon. 138. Mod. Ca. 122. Vide Ray. 220. 2 Lev. 35.

Under an original writ in a plea of trespass on the case, on promises, the sheriff took a bail-bond, conditioned for the defendant's appearance, &c. in a plea of trespass; and it was holden good. 6 T. R. 702.

So, if he takes only one bond for three defendants, who are sued severally. Mod. Ca. 122.

So, if the day of appearance be after the term, or impossible. Semb. 3 Lev. 74. Fort. 363.

So, if the bond be without any condition. 10 Co. 100. a.

Or, taken of him who is not bailable. 10 Co. 100. b.

If the bond be to the sheriff not by the name of his office. 2 Jon. 138.

Or, to the sheriff in *com. perdict.* for *prædict.* R. Pal. 378.

Or, to another by the name of sheriff, and not to the sheriff. 10 Co. 100. b.

But, if the county be named, and it be to the sheriff, without saying *de com. prædict.* it will be good. R. 2 Lev. 123.

To take advantage of a bail-bond's not being made to the officer by the name of his office, *oyer* of the bond must be prayed. Fort. 371.

So, if the bond was to A., without saying *tunc vicecom.* it is bad, though the declaration be *ad respond.* A. *nuper vicecom.* R. Cro. El. 300.

If the bond be to appear, and also to pay chamber-rent. R. Ray. 222. 1 Vent. 237.

Or, also to indemnify the sheriff. 10 Co. 100. b. R. Dal. 76.

[\*]So, if the bond adds, appear, and there receive farther as they shall award. Dy. 364. a. in marg.

So, if the bond has no condition, or, which is the same, an impossible one; for then the bond is single. Semb. 3 Lev. 74, 75.

So, if it be to appear *coram majestate sua*, without saying *coram domino rege.* R. 2 Lev. 177.

*Ad respond. billæ* for 100*l.* without saying at whose suit. 2 Lev. 177.

If it be to pay for a debt. 10 Co. 100. b.

So, the statute is no plea, if the bond was taken without legal process; for he ought to plead *dures.* 2 Jon. 76. Semb. Cro. El. 646.

But a bond, that the defendant appear personally, is good, though the statute says, no sheriff shall take obligation but by name of his office, on condition that the prisoner shall appear at the day and place as the writ shall require. Dy. 364. in marg. R. 2 Leo. 78. 10 Co. 101. Sav. 81. Cro. El. 776.

A bail-bond is good, though made two days after the return of the writ; for defendant has four days to put in bail. Fort. 365.

If the bail-bond is for more than the sum in the writ, it is not void; it is only a misdemeanor in the officer. Fort. 366. C. B. Fort. 370.

Bail-bond is good, though the indorsement of the writ is different from the *ac etiam.* Fort. 367.

So, that the defendant appear, &c. and then and there answer, &c. for it is tantamount to *ad respondendum* as the writ speaks. R. Dy. 364. a. Dub. 2 Leo. 78. Acc. 10 Co. 101.

That he appear before *justic nostris de B.* without saying *apud Westm.* is sufficient. R. 2 Vent. 238.

Or, *coram rege in cancellar.* though it says, *apud Westm.* instead of *ubique.* Semb. 2 Vent. 238. Cont. 1 Vent. 234.

Or, *coram just. de B. R. apud Westm.* without saying, *ad placita coram nobis,* &c. R. 2 Jon. 46. 2 Lev. 180.

In the star-chamber, without saying *coram rege et concilio,* &c. Per Twisd. 2 Jon. 46.

On a special original returnable *coram dom. rege, ubicunque tunc fuerit in Anglia,* a bail-bond without the *ubicunque,* &c. is good; for there are no set forms of words for these bonds; and if in substance they are to appear according to the design of the writ, it is sufficient. Str. 1155.

That he appear *ad respondendum, de placito debiti* generally, where the writ is for 350*l.* R. 2 Cro. 286.

Or, *ad respondendum,* without saying *in quo placito,* if the writ is recited in the condition. R. 2 Lev. 123.

If the process is in trover, and the condition of the bail-bond to answer to a plea of trespass, yet it is good: the *ad respond.* is surplusage. Fort. 368.

So, a bond to save harmless from past escapes, is not void, otherwise from future escapes. Mod. Ca. 225.

So, a bond to the party, and not to the sheriff, to pay or give security for  
[\*386]

such a sum, or render himself to prison, is not within the statute. R. 2 Mod. 305.

So, a bond that he will be a true prisoner, is not within the statute, if he traverses the ease and favour. R. 1 Sid. 383. Per Holt, Sal. 438. Semb., cont. 10 Co. 100. b.

[\*]Or, by a person, not in his custody, for payment of money levied upon a *fieri facias* into court at the return. R. 10 Co. 99. b.

Or, for the due execution of a *fieri facias*. R. 10 Co. 100. a.

Or, for payment of money to the king upon an extent. 10 Co. 100. a.

So, the bond is not void, though the bail be insufficient. R. Cro. El. 808. 852. 862. Mo. 636. Vide Bail, (K 5.)

So, the bond is not void, if given by a person not in his custody, or who need not appear. R. Mo. 452. D. 4 Mod. 187.

Yet a bond taken by him who is no minister within the st. 23 H. 8. 10. in a case notailable, is void by the common law. R. Hard. 464.

Or, if the bond be for profit to himself. Sal. 438.

Or, to let to bail a man notailable. 10 Co. 100. b.

Or, for his fees, before execution done. R. Hut. 52.

An agreement in writing to put in good bail for a person arrested on mesne process at the return of the writ, or surrender the body, or pay debt or costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by this statute. 1 T. R. 418.

The undertaking of an attorney for the appearance of a defendant, is not within the statute, because it is given to the plaintiff in the action, and not to the sheriff. Ibid. Vide Bail, (K 5.)

A bail-bond may be assigned by the sheriff after he is out of his office. Fort. 365.

If the assignment is said to be *sigillat. & attestat.* it is well, though not said to be under hand and seal. Fort. 367.

If to a bail-bond given to the prison-keeper of the marshal's court, the statute be pleaded, and that A. sued forth of the palace, it is bad; it should be, sued forth of the court of the palace. Fort. 370.

Bail-bond on an attachment (except out of Chancery for want of appearance or answer) is void. Barnes, 64.

### Replication.

If the defendant in his plea sets out an arrest under a different writ from that upon which the bail bond was given and the plaintiff in his replication sets out that writ, he should not traverse the other. D. anon. Ld. R. 562.

But the traverse will not make his replication bad. R. Ld. R. 562.

To this plea the plaintiff may say, that it was for security of his prisoner, and traverse that it was for ease and favour. R. 1 Sand. 162. 1 Lev. 254. 1 Sid. 383.

And if issue be thereon, little evidence will be sufficient. R. 1 Sid. 383.

### (3 W 26.) The st. 16 Car. 2. against gaming.

So, to a bond the defendant may plead, that it was given for money won at play contrary to the st. 16 Car. 2. Clift. 187. 5 Mod. 3. Lut. 485. Vide ante, (2 G 8.)

The defendant must shew at what game the money was lost. Str. 493.

He must shew the statute.

That he lost upon tick at the same time above 100/.

But in an action upon a security for more than 100/. if the defendant [\*]pleads that the whole of it was lost at play at the same time, he need not allege that the play

[\*387] [\*388]



was upon tick, the security proving that they did not play for ready money. R. Ld. R. 87.

That the bond was given for the same sum.

But the statute is not pleadable, where debt is brought for a wager when he was at play. R. 5 Mod. 6. Lut. 487.

It is no plea to a bond that it was given for the repayment of the moiety of a sum paid by the obligee, (with whom the obligor was jointly concerned) for compounding differences for not delivering stock, &c. and not performing contracts, &c. which are prohibited by st. 7 G. 2. c. 8. 4 B. M. 2069.

### (2 W 27.) The st. 5 Ed. 6. against sale of offices.

That it was given upon the sale of an office within the st. 5 Ed. 6. F. g. 45.

It is not sufficient in the plea to state generally that the case is within the statute, but facts must be set forth to shew that it is so. Willes, 241.

But it is no plea to debt upon a bond, that it was given for composition of felony; for it is a bare fact, which is no plea in bar of a specialty. Semb. F. g. 74.

### (2 W 28.) Tender.

So, to debt upon bond the defendant may plead a tender, and always ready. 2 Mod. Int. 234. Bro. V. M. 213. Vide Condition, (G 6, &c.)

If issue be upon the tender, there must be an actual offer.

But where the goods are cumbersome, the bringing of them to a place where the party may well receive them, and the offer of them there is sufficient. R. Sho. 149, 150.

To a legal tender, the actual production of the money is requisite, unless dispensed with by the creditor. 3 T. R. 683. 10 East, 101.

Tender of a larger sum is good, 3 T. R. 683. ; if divisible without giving change. 6 Taunt. 336.

Bank notes are not made a legal tender by 37 Geo. 3. c. 45. 2 B. & P. 526.

Tender by an agent enures for the principal, though authorized only to tender a less sum. 2 M. & S. 86.

Tender to an agent, a managing clerk, is good, though ordered by principal not to accept it. 1 Mars. 55. 5 Taunt. 307.

Tender to one of two joint creditors, is a tender to both. 3 T. R. 683.

The right to tender is not barred by the circumstance of steps having been taken towards commencing an action. 8 T. R. 629.

In C. B. the plaintiff is bound, at the risk of subsequent costs, to accept the debt and costs up to the time of tender. 2 Taunt. 203. If the offer amounts to a legal tender. 1 Mars. 392. 5 Taunt. 840. Though he goes for other causes. 2 Taunt. 283. *Secus* in K. B. 13 East, 551.

A tender and refusal is not equivalent to payment. 2 T. R. 27.

A tender in discharge of a bare covenant to pay money is good. 7 Taunt. 486.

This plea does not go in bar of the action, but of damages. R. 1 Vent. 322. 2 Lev. 209. R. upon a single bill. Carth. 133.

But if tender be upon a bond with a penalty, it must be in bar to the action. R. Carth. 133.

And it cannot be pleaded after an imparlance. Dub. Dyer, 300. [\*]Semb. 36 H. 6. 13. 2 Cro. 627. 5 Ed. 4. 141. R. Lut. 226. 239. Adm. good to a bond, though in no other case. 2 Mod. 62.

If the declaration has several counts, it must be pleaded to a count in certain. R. Lut. 239.

Must shew the day of the tender. 1 Sid. 10.

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And if it be at a day after the time limited by the condition, *abinde* always ready, is bad. R. M. 9 W. 3. (Vide 1 Ld. Ray. 254. Sal. 622.)

Or, at a day after the time of request alleged in the declaration. R. Lut. 227.

Must allege always ready after the tender, for still ready is not sufficient. Dub. Dy. 300. b. Acc. 2 Cro. 627.

A plea of tender, in *assumpsit*, must aver a continual readiness to pay from the time the debt accrued. 8 East, 168.

Tender, when pleaded to the whole declaration, cannot afterwards be limited. 3 Taunt. 95.

There must be a *proferit* of the money in court. R. 2 Rol. 524. D. 9 H. 6. 65. Bro. *touts temps prist.* 3. 5, 6. R. Lut. 283. 368.

But, where it appears that the thing to be delivered is so ponderous that it cannot be brought into court, it is not necessary. Co. Lit. 207. a. 2 Rol. 524. Ash. Ent. 276.

The plaintiff may on denial of plea, take out the money. 1 B. & P. 332.

So, when a forfeiture is to be saved, a tender is necessary. R. 1 Vent. 322. 3 Keb. 800. 810. 828. Ray. 419. R. 3 Lev. 103.

Otherwise, it is not necessary. R. Ray. 419. cont. in rent. 1 Vent. 322. 2 Lev. 209.

The tender alleged must be legal; and therefore it is not sufficient to say *paratus fuit solvere*, without saying *et obtulit*. R. Sal. 584.

A tender of corn, &c. must be with an *uncore prist.* R. Dy. 25. a.

So, if by bond money is to be paid within two months after the death of the obligee, if he pleads that within two months there was no executor or administrator, he must say *uncore prist.* R. Raym. 416.

In pleading a tender of a sum according to a defeasance, (which is in a different instrument from the original deed,) it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court; it is sufficient to plead that on the day he tendered, &c. Willes, 107. (Com. 568.)

*Aliter* if the defeasance be in the same deed. Ibid.

It is sufficient to allege, that no one was ready to receive, in the words of the condition. And therefore if the condition was to pay to B., if it is said *prædict. B. non fuit paratus ad recipiendum*, it is sufficient, without saying *nec aliquis alius*. R. Yel. 38. 2 Cro. 14.

So, surplusage does not prejudice; as, if he says, no one ready *ad exigendum et recipiendum*, though a demand was not requisite. R. Yel. 38. 2 Cro. 14.

So, if a bond be to pay a legacy, which was payable upon request, it is sufficient to say *touts temps*, &c. for the bond does not alter the nature of the legacy. R. 1 Leo. 17.

But, where damages are to be recovered, and not the debt, a tender may be pleaded without *uncore prist.*: as, in covenant to pay to A. or his order, a tender to B. who has an order, and refusal, is a good plea, without saying *uncore prist.* R. Sho. 130.

[\*]So, in *replevin*, if the defendant avows for a rent-charge, the plaintiff may plead a tender, without a *proferit in cur.* R. Sal. 584.

And though the plaintiff accepts the money brought into court, the plea will be bad. Ibid.

And where a tender is pleaded, and the money brought into court, and the plaintiff accepts it, he cannot afterwards proceed for damages. Per Holt, B. R. H. 13 W. 3. (Vide 1 Ld. Ray. 639. Sal. 583.) (Vide 2 Ld. Ray. 774.) R. 2 Cro. 126.

If defendant bring money into court on a plea of tender, plaintiff may take it

out, though he reply that the tender was not made before action brought. 1 Bos. & Pull. 332.

So, now by the st. 4 & 5 An. 16. at any time pending the action on a bond with a penalty, if the defendant brings into court all principal and interest due, and all costs expended in law or equity, on such bond, the court may discharge the defendant from said bond. Vide ante, (C 10.)

But, such proffer cannot be made before bail to the action. Mod. Ca. 11.

All facts but the amount of the damages are admitted by a plea of tender. 3 Taunt. 95.

(2 W 29.) *Solvit ad diem.*

So, to debt upon bond the defendant may plead *solvit ad diem*; for before breach it is well without an acquittance. Sal. 508.

So, payment of part with an acquittance *puis darrein continuance*; for this goes in bar. R. Sal. 519.

And now, by the st. 4 & 5 Ann. 16. if he has paid before the action brought, though it was not strictly at the day, he may plead it.

If the condition be that he pay at D., he must plead *quod solvit* at D., and the omission is not supplied by *secundum formam conditionis predict.*, upon a special demurrer. R. 3 Lev. 245.

A. gave B. a bond to secure an annuity, and before any payment became due A. lent B. a sum of money; on which it was agreed that B. should retain the payments of the annuity as they became due, till that sum was discharged: then B. became bankrupt; and the agreement to retain was held a good plea to an action on the bond by B.'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem*. 3 T. R. 599.

If it be, that he pay within six months, he ought to plead payment within the time. R. Cro. El. 823.

If the condition be to deliver 20l. or ten cows, at the obligee's election, he must plead tender of one and the other. R. 1 Leo. 68.

If the condition be that he pay upon assurance of an estate, he must shew when the estate was conveyed; for payment at such a day is not sufficient, for it does not appear that it was paid upon the assurance. R. 2 Mod. 33.

So, it will be a good plea that he paid before action, viz. such a day, which is before the day; for the words after the viz. shall be rejected. R. 2 Mod. Ca. 345.

But, it is no plea *quod fuit itinerans ad solvendum ad diem*, and he was imprisoned by *covin* of the obligee. R. Cro. El. 672.

That it was not demanded, though payable upon demand; for the suit is a demand. R. 2 Cro. 242, 3.

[\*] *Quod solvit pendente lite*, without a specialty for his discharge. R. Cro. El. 157. 884.

Or, after the day, without an acquittance for it. R. 5 Co. 43. a. Cro. El. (455.) Mo. 692.

Or, that the plaintiff agreed to give a longer day for payment. R. Cro. El. 697.

In debt on bond from defendant's testator and A., jointly and severally, if defendant pleads that testator in his life-time, and A. paid off the bond, and plaintiff replies, they did not pay it *modo et forma*, &c. and it appears, that testator paid part in his life, and A. the rest after his death, this does not maintain the plea. B. R. H. 133.

*Solvit ad diem* ought to be concluded with an averment, and not to the country. R. 1 Sid. 215. { Vide *Coan v. Whitmore*, 12 Johns. Rep. 353. }

If payment in full is pleaded, it is sufficient, if it is proved that plaintiff accepted the sum paid as in full. Str. 691.

If any interest has been paid after the day upon an old bond, (where the only evidence of payment is the length of time,) defendant must plead upon stat. 4 & 5 Ann. c. 16. Str. 652.

It is now an invariable rule, that if there is no demand for money on a bond for twenty years, the judges will direct a jury to find it satisfied, from the presumption arising from the length of time. 2 Atk. 144. 1 T. 270.

Payment before the day is evidence under the plea of *solvit ad diem*. D. 3 T. R. 601.

If he plead payment before the day, the plaintiff may demur. 2 Mod. Ca. 346. D. cont. 3 T. R. 601.

If the bond is conditioned to pay on or before, payment before the day, *scil.* such a day, is good. 2 Wils. 173.

If money is payable at or before such a day, and is paid before, it should be pleaded, paid at such precedent day; and plaintiff may reply, not paid that day, nor before nor after. 2 B. M. 944.

To an action of covenant to pay money on a particular day, the defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. Willes, 585.

On a covenant to pay money at the end of six months, it will be understood to mean calendar, (not lunar months.) Semb. *ibid.*

A replication taking issue on a plea of payment to debt on an annuity bond must be signed by a serjeant. 1 Bos. & Pul. 469.

### (2 W 30.) Release.

So, to debt upon a bond or specialty, the defendant may plead a release by the plaintiff, after the bond given. Vide post, (3 M 12.)—Vide ante, (2 V 11.)

If there are two obligees, a release by one. 2 Rol. 410. l. 47.

If the bond was to a woman before coverture, a release by the husband. 2 Rol. 410. l. 50. 52.

A release by one executor or administrator, where the debt was to the testator, or to them in right of the testator. 2 Rol. 411. l. 7. 10.

But if the release produced has a material variance from the release in the plea, it is bad: as, if it be of a different date. R. 2 Vent. 131.

To a release pleaded, the plaintiff, being a party to the deed, [\*] cannot plead *ne relesas* pas, but must demur, or say *non est factum*. R. 2 Bul. 55.

Otherwise, if he be a stranger to the release. *Ibid.*

So, if there are two obligors, who bind themselves jointly, a release to one may be pleaded in bar by both. 2 Rol. 412. l. 29.

So, if they are bound jointly and severally. *Ibid.* l. 22. Sal. 574.

If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do that the deed of covenant may be pleaded in bar, he may still sue the obligor. 8 T. R. 168. 13 Will. 3. 1 Ld. Raym. 690. Salk. 575. Holt, 178. 12 Mod. 548. S. C. 11 Mod. 254.

Though the release to one was before the other had executed the deed. *Ibid.* l. 35.

So, if they are severally bound for the same sum. Semb. *ibid.* l. 45.

So, if the bond be by A., for the faithful service of B., a release to B. before the condition broken is a good bar. R. 3 Leo. 45.

But in debt for damages recovered in a real action by two demandants, a release by one is no bar; for this savours of the realty. 2 Rol. 411. l. 17.

So, in *quare impedit* by two, the release of one is no bar to the other. Ibid. l. 15.

Nor, in ejectment. Ibid. l. 20. 45.

Nor, in error to reverse a fine. R. Skin. 343.

So, if a bond be delivered by two to a third hand, to be delivered upon condition, a release of the condition by one is no bar to the other; for this goes only in his discharge. 2 Rol. 411. l. 2.

So, if a bond be by two, a release to one, after his sealing, and before the other has sealed and delivered, is no discharge to the other. R. Cro. El. 161.

So, in replevin, if the defendant makes cognizance in right of B., and there is judgment for the plaintiff, in *scire facias* upon the judgment a release by B. is no plea. R. 2 Rol. 412. l. 5. Vide ante, (2 V 11.)

So, if a bond be, that B. shall serve truly, a release to B., being a stranger, after the forfeiture of the bond, is no plea. R. 3 Leo. 45.

So, if the bond was to A., as trustee for B., a release by B. with an averment that it was in trust for him, is no bar. R. Dal. 38. 1 Lev. 235. 3 Lev. 140.

If the obligor of a bond, after notice of its having been assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligor, the court will set the plea aside; and they will not under these circumstances allow the obligor to plead payment of the bond. 1 Bos. & Pul. 447.

So, a release by A., after an assignment by commissioners of bankruptcy against B. R. Pal. 505.

Nor, a release by A. of all actions on his own account. R. 1 Vent. 35.

A release by plaintiff's testator's will sealed, cannot be pleaded to debt on bond. B. R. H. 357.

So, if a man receives part of a debt due upon specialty, and releases it, this release does not discharge the residue. Vide ante, (2 G 14.)

[\*]So, if a bond is in the penalty of 400l. for payment of 200l. and he receives and releases 300l. R. 2 Rol. 413. l. 15.

So, it is no plea that he gave another bond in satisfaction. R. Cro. El. 716. R. Cro. Car. 85. R. Hob. 86. Acc. 2 Cro. 579. Vide post, (2 W 46.)

Or, that the plaintiff accepted a statute-staple after the day of payment in satisfaction. R. Cro. Car. 86. 6 Co. 44. b.

Or, that the defendant agreed by indenture to sell land in satisfaction of the debt. R. Cro. Car. 193.

Or, enfeoffed the plaintiff in satisfaction of the debt. Cro. Car. 86. R. 2 Cro. 650.

Though the other bond is after or before the day of payment by the prior bond. 2 Cro. 100.

Yet, if the plaintiff does not demur, but joins issue, that there is no other bond, and there is a verdict for the defendant, the plaintiff shall not have judgment. R. 1 Brownl. 74. Hob. 69.

### (2 W 31.) *Comperuit ad diem.*

So, to a bail-bond the defendant may plead, *comperuit ad diem*. Bro. R. 203.

But if, on justifying bail, proceedings on bail-bond are ordered to be stopt, and bond to stand for security; and after judgment in original action, plaintiff proceeds on bond, defendant cannot plead *comperuit*, &c. Barnes, 85.

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(2 W 32.) Covenant, &c. that he would not sue.

So, if a man covenants, &c. that he will sue for a year, it will be a good plea, if he sues within the time. Dy. 140. a. in marg. { Vide Chandler v. Herrick, 19 Johns. Rep. 129. }

To debt brought by husband and wife on a bond, conditioned for the payment of a certain sum at a certain day, defendant pleaded that by articles of agreement between the wife, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened ; but, as the plea did not allege the payment of the interest, it was holden bad. 5 T. R. 250.

(2 W 33.) Condition performed.

So, to debt upon bond the defendant after *oyer* may plead condition performed. Vide ante, (E 25, 26.—2 V 13.)

{ And the want of *oyer* is a fatal omission, United States v. Arthur, 5 Cranch, 257. }

And it is sufficient to plead in the words of the condition.

So, if the condition be to pay, if a ship returns, (perils of the sea excepted,) but if it is lost, that the obligation shall be void ; it is sufficient to say it was lost, without saying by peril of the sea. R. 2 Lev. 7.

If the condition be in the disjunctive, it is sufficient to plead performance of one part or the other.

And if the performance is to be upon a prior act by the plaintiff, he may plead that the plaintiff has not done such first act. R. 1 Mod. 265.

If the last words of the condition are an enlargement of the first [\*]he need not plead to them ; for it is sufficient, if the plea goes to the material part of the condition. R. Mo. 477.

So, in debt upon bond for performance of covenants, if the defendant pleads condition performed, and the plaintiff assigns breach for non-payment of rent, *secundum formam conditionis prædict.* it will be well on a general demurrer or verdict. R. Hard. 319.

So, in debt upon bond for performance of covenants in an indenture if the defendant shews the indenture, and pleads covenants performed, he need not say *quæ sunt omnes conventiones*, &c. R. 13 H. 7. 19. b. R. 6 Ed. 4. 1.

If the condition be to perform a will, whereby a legacy is given to the poor or churchwardens, it is sufficient to say, that he paid it to them, without naming them. R. 1 Leo. 17.

But the defendant cannot plead conditions performed to a bond for performance of covenants, without *oyer* of the deed, which contains the covenants. R. 1 Sid. 50. 97. 425. 1 Vent. 37. R. Al. 72. Vide ante, (P 1.—2 V 13.)

And he must make a *profert in cur.* of the deed, otherwise it will be bad upon a special demurrer. R. 1 Sand. 9. Vide Ante, (P 1, 2.)

And shew the substance of the deed in Latin, under seal of the plaintiff ; or, if he has it not, the court *ex gratia* will direct that the other party shall give him a copy. Ibid. 1 Sid. 5.

If to debt on bond, conditioned for performance of covenant in an indenture, the defendant plead performance generally, without setting out the indenture ; the plaintiff may either demur *instantur*, or set out the indenture, and thereupon, if it appear that some covenants are in the negative or disjunctive, demur ; if they are all affirmative, the informality of the plea is cured by thus shewing the indenture. 4 East, 344.

The rule is, without an exception, that in debt on bond for the performance of a collateral contract, general performance is no plea without setting forth the whole of the contract, or at least, without averring that it contains no negative or disjunctive stipulations, even if that would be sufficient. To state that the agreement was for building a house conformably to particulars annexed to the agreement, "amongst which particulars," were such and such, &c. is an admission that there were other particulars besides those detailed. 4 East, 340.

If a bond is given to A. as a collateral security for performance of a covenant to pay certain interest to B. the covenant cannot be pleaded in bar to an action on the bond, without averring performance. 5 T. R. 250.

< A plea of *omnia performavit* is not a sufficient answer to a declaration on a bond conditioned, that the debtor, a third person, should pay such sum as the creditor should recover against him, on review. *Freeland v. Ruggles*, 7 Mass. Rep. 511.

So, a plea which admits the plaintiff's right to recover a part of the penalty of a bond, is bad. *Fitzgerald v. Hart*, 4 Mass. Rep. 429.

So, a plea, in debt on replevin bond, that, there has been no final judgment for the return of the goods, without alleging, that he prosecuted his replevin to final judgment. *Lindsay v. Blood*, 2 Mass. Rep. 518. >

If the condition of the bond be to do several things, the defendant cannot plead performance generally, though all are in the affirmative, but shall answer specially to every particular. R. 1 Lev. 203. D. 1 Sid. 215. pl. 18. Keilw. 95. b. pl. 3.

Nor, if the things to be done are particular, and in the affirmative; but he must shew how and at what time. Vide ante, (E. 25, 26.)

So, if the condition consists of several parts, he must answer to all the particulars. R. Mo. 591. R. 2 Mod. 305.

So, to debt on bond for a receiver of rents to account, and behave himself as a steward ought to do, if defendant pleads he received but one penny, which he paid to obligee, it is bad; for he should also have pleaded, that he had behaved as a steward ought. B. R. H. 322.

Yet, where the condition consists of multifarious particulars, performance generally has been allowed. Lut. 593.

[\*] To debt on bond, conditioned that one B. R. should account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance; the plaintiffs replied, that B. R. had received divers sums amounting to a large sum, viz. 100*l.* from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over, &c. It was holden, on special demurrer, that the replication was sufficiently certain. 8 T. R. 459.

To debt on bond conditioned for J. S. rendering account to the plaintiff of all monies which he should receive as their agent, defendant pleads performance in the words of the condition; plaintiff replies, that J. S. received divers sums of money amounting to 2000*l.* belonging and relating to the plaintiffs' business as their agent, and hath not rendered to the plaintiffs an account of the said 2000*l.* or any part thereof. This replication being specially demurred to for generality, was holden sufficient. 1 Bos. & Pull. 640. Dougl. 215.

So, the defendant cannot plead *quod conditio obligationis nunquam fracta fuit*, but must shew how it was performed. R. 2 Vent. 156.

That no covenants or no suits are mentioned in the condition; for he is estopped. R. Cro. El. 756. Vide ante, (2 V 6.)

If the condition is to save harmless from rent for a tenement against A., it is no plea that no rent is due, but he shall say not damnified. R. Sav. 90.

Yet, if the condition is to indemnify, &c. the defendant may plead in the negative *non fuit damnificatus*. Vide ante, (E 25.)

Though the condition be to acquit, discharge, and keep indemnified. R. 3 Mod. 252. R. 5 Mod. 243. Adm. 2 Sand. 84.

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The only pleas to bond to indemnify, are *non damnificat.*, or by plaintiff's own fault. 2 Wils. 126.

If defendant in debt by church wardens, on a bond to indemnify parish from a bastard, pleads *non damnificatus*; replication he did not provide, parish paid 5*l.*, rejoinder he did and provide; and verdict for plaintiff; judgment shall not be arrested, because it does not appear on the record that the child was born in the parish; for the court will intend it was proved at the trial. 2 Wils. 5.

To debt on bond to save harmless from expenses by reason of naming one to a curacy, or from suits by reason thereof, if the defendant plead *non damnificatus*; the plaintiff may reply and assign for breach, that he was obliged to pay such a sum by reason of such nomination, without saying how he was obliged. 2 Wils. 11.

So, if the condition be to deliver a deed, &c. it is sufficient to say that he has delivered it. R. Sal. 498.

So, regularly, performance of the condition ought to be pleaded in the words of the condition. Sal. 520.

But excuse of performance need not pursue the words of the condition: as, if upon a bail-bond he plead judgment undetermined, it is sufficient, without saying that the plaintiff did not discontinue, nor was nonsuited. Ibid.

If the condition be to leave his wife 50*l.*, it is not sufficient to say that he made his wife executrix, and gave her to the value of 100*l.*, without saying that she administered, and accepted it. R. 3 Lev. 218.

So, if the condition be to exhibit an inventory into the spiritual court before 1 M., it is not sufficient to say there was no court, [\*]without saying that he was ready at the day; for he ought to shew every thing possible on his part. R. 1 Sal. 172.

So, if the condition be to levy a fine, it is no plea that no writ of covenant was sued, without saying that he was ready at the day. Ibid.

Or, to pay money to A., it is no plea that A. did not come, without saying that he was ready there. R. 1 Sal. 172.

If the condition be to repair, it is no plea that he repaired till such a day, and then pulled down and rebuilt. R. Sav. 96, 97.

If it be, that his wife may make a devise of 100*l.* to be paid within a year after her death, it is no plea to say that his wife devised 100*l.*, if he does not say also that he paid it. R. Cro. Car. 597.

If A. gives bond, conditioned to pay B. so much money as C. is awarded to pay him, and C. is awarded to give B. a promissory note, it is within the condition of the bond. Andr. 28.

Wherever defendant pleads performance, plaintiff must assign an absolute breach; but this is not necessary, if he pleads a collateral matter; as, a release. 2 B. M. 944.

To debt on bond conditioned for the payment of money, the defendant cannot plead that it was given as an indemnity against another bond, and that the plaintiff has not been damnified. Cowp. 47. 1 Bos. & Pull. 638.

{ In debt on an administration bond, against a surety, the defendant may plead performance of conditions, generally, by the administrator. *Dawes v. Gooch*, 8 Mass. Rep. 488.

So, in debt on bond for the performance of an award, an allegation of payment of the sums awarded, to the partner of the plaintiff, not a party to the bond, but whose joint concerns with the plaintiff, were referred to the arbitrator, is good. *Peters v. Pierce*, 8 Mass. Rep. 398. }

## (2 W 34.) Upon a statute or recognisance.—Release.

To debt upon a statute or recognisance, the defendant may plead a release. Vide ante, (2 W 30.)

A release by one conusee. 2 Rol. 411. l. 5.

But a release of part due upon a statute or recognizance does not discharge the residue. R. 2 Rol. 413. l. 5. Vide ante, (2 W 30.)

### (2 W 35.) Defeasance.

So, the defendant may plead a defeasance for payment of a less sum which he has paid. 1 Bro. Ent. 174. Vide post, (2 W 37.)—Ante, (2 V 12.)

A bond conditioned for payment of money on 25th of December; a subsequent deed between the same parties, by which the obligee covenanted that if the obligor should pay on the 25th December 5s. in the pound, &c. such payment should be accepted in full discharge and satisfaction of all sums due, &c. and might be pleaded and given in evidence, &c.; the obligor (to an action on the bond) pleaded a tender and refusal of the 5s. in the pound on the 25th of December, and holden good. Willes, 107. (Com. 568.) S. C.

A defeasance that he shall not be sued till such a day, and if he be, that he may plead it in discharge. Hard. 113. But it was resolved cont. where it was not an absolute discharge; for it shall be but a covenant. Sho. 46. Carth. 64.

A letter of licence, by which it is agreed that, if he sues within such a time, the debt shall be forfeited. R. Carth. 64.

So, to debt for rent he may plead a covenant to deduct so much for charges, &c. R. 1 Lev. 152.

But a defeasance, which is not in writing under seal, is not sufficient. R. Mo. 573.

But to debt upon a statute or recognizance, it is no plea that he had judgment before in a *scire facias* upon the same recognizance. R. Cro. El. 608.

### [\*](2 W 36.) Upon judgment.—Execution done.

To debt upon a judgment, the defendant may plead that the plaintiff had sued out execution by *elegit*, upon which an extent was made. Dy. 299. b. Vide ante, (2 W 13.)

And it will be good without shewing the return of the extent. Dy. 299 b.

The defendant need not shew a return of the writ upon any plea of execution done. Ld. R. 634.

Or, that the plaintiff had execution by *fieri facias*. Adm. Cro. Car. 328. R. Sav. 123.

Or, merely "that the defendant's goods were seised in execution upon the judgment." Ld. R. 1072.

But it is no plea that the plaintiff sued out a *ca. sa.* and took the defendant and kept him in execution till he satisfied the debt. R. Lut. 641. 3.

Or, that he sued several *elegits*, upon one of which part of the debt was levied. R. 1 Lev. 92.

That error is depending upon the judgment in the Exchequer. R. Skin. 388. 590.

### (2 W 37.) Defeasance.

So, to debt upon a judgment the defendant may plead a defeasance. 2 Mod. Int. 231. Vide ante, (2 W 35.)

So, now by the st. 4 & 5 An. 16. if debt be brought upon any judgment, if the defendant has paid the money due on such judgment, it may be pleaded in bar of such action.

But a bond given for a sum, which was in satisfaction of the judgment, is no plea; for being only to give another action for the debt, it would not be

a bar to the bond, *a fortiori*, nor to the judgment. R. 2 Cro. 579. Vide Condition, (L 2, 3.)

So, to a *scire facias* upon a judgment, he cannot plead a judgment in debt upon the same judgment. R. Cro. El. 817.

(2 W 38.) *Nul tiel record*.—When this plea is necessary.

So, to debt upon a judgment, the defendant may plead *nul tiel record*. Vide ante, (2 W 13.)—Vide Record, (B.)

So, if there is a material variance between the judgment and the declaration: as, if it varies in day or continuance. Lut. 945. What variance is material, vide Record, (C.)

So, if it varies in the attorney's name. Dub. 2 Mod. 246.

Variance from *scurphey* in judgment, to *curphey* in recognizance, fatal. Barnes, 475.

On debt on recognizance of bail, if the record is conditional, and the declaration not, plaintiff cannot have judgment. Barnes, 60.

(2 W 39.) When error may be pleaded; when not.

So, if error be pending on the judgment in C. B. where the record itself is removed, it may be pleaded in abatement. R. 2 Vent. 261. Dub. 4 Mod. 247. Vide Dett, (A 2.)

[\*]And he must plead in abatement; for if the defendant demurs, the plaintiff shall have judgment. 2 Vent. 261.

But to debt upon a judgment, the defendant shall not plead in abatement, error depending thereon. Semb. Lut. 602.

If error be in the Exchequer or parliament upon a judgment in B. R. for only the transcript of the record is removed. R. 1 Sid. 236. R. 4 Mod. 247. R. Sho. 98. R. Ray. 100. R. Sho. 146. Carth. 1. 136. Vide Dett, (A 2.)

Nor, can he plead in bar error in the original judgment. 1 Rol. 604. l. 20.

(2 W 40.) But matter entitling to an *audita querela* cannot be pleaded.

Nor, matter which entitles him to an *audita querela*; for he shall be put to his writ of error, or *audita querela*. 1 Rol. 604. l. 25.

(2 W 41.) Nor arbitrament.

Nor, an orbitrament. 1 Rol. 604. l. 25. { But vide *Wheeler v. Van Houten*, 12 Johns. Rep. 311. *cont. ut semb.* }

(2 W 42.) Demurrer.

Nor, can he demur to the declaration, if it shews error depending upon the judgment. R 2 Vent. 261.

(2 W 43.) Upon contract.—*Nil debet*.

To debt upon a contract the defendant shall plead *nil debet*. Vide ante, (2 W 17.)

So, to debt upon a judgment in a county, hundred, &c. not of record. Sho. 71.

To debt upon a grant of a rent-charge; for he has remedy also by distress. Hard. 333.



(2 W 44.) *Nil detinet.*

So, if debt be in the *detinet* only, he may plead *nil detinet* Al. 76.  
And if he pleads *nil debet*, it shall be aided after verdict. Ibid.

The defendant may plead one plea to part, and another plea to the residue of the debt. 1 Sal. 180.

## (2 W 45.) Wager of law.

So, to debt upon a simple contract the defendant may wage his law. 2 Inst. 45.

So, the defendant may wage his law in debt upon a by-law. 2 Lev. 106.

And in debt upon an arbitrament. Co. Lit. 295. a. R. Cro. El. 600.

In debt upon a simple contract, though assigned to commissioners of bankrupt. 2 Lev. 106.

In debt for a penalty, or amerciamēt in a court baron, hundred, [\*] or other court not of record. Co. Lit. 295. a. Mo. 276. 2 Rol. 106. l. 10. Bend. pl. 200. R. 1 Leo. 203. 2 Lev. 106.

So, in debt upon a recovery in a court not of record. R. 2 Vent. 171. Cont. 2 Mod. 140.

In debt upon an account made before one auditor only. Co. Lit. 295. a.

In debt upon a contract for sale of land. R. Cro. El. 750.

In debt upon contract where a bond was given for the money. Dal. 53.

But in debt upon a deed or specialty the defendant cannot wage his law. Co. Lit. 295. a.

Nor, in debt upon a statute. Ibid.

Or, upon an arbitrament. Lut. 213.

So, the defendant shall not wage his law in debt for scavage or other duty, by the custom of London, which is confirmed by parliament. R. 3 Lev. 106.

In debt upon a judgment in an inferior court. R. 2 Mod. 140.

In debt upon an account as bailiff. R. Cro. El. 579.

Nor, in debt for rent upon a lease for years. Co. Lit. 295. a.

Nor, in debt upon an account before auditors for balance or surplusage of the account. Ibid.

Or, for a fine or amerciamēt in a leet or other court of record. Ibid.

Nor, in debt for his diet. Per Gaudy, Cro. El. 818.

Nor, in debt to the king, though due to the king's debtor. Godb. 291.

So, a man infamous cannot wage his law; as, if he be convict in attain, or upon an indictment of conspiracy, perjury, &c. Co. Lit. 295.

Nor, a man outlawed. Co. Lit. 295. a.

Or, within age. Ibid.

Nor, an executor or administrator; for he shall not wage his law for another's debt. Ibid.

Yet, in debt against husband and wife, *dum sola*, both may wage law. R. Cro. El. 161.

So, if an alien be plaintiff, the defendant shall not be allowed to wage his law. Co. Lit. 295. a.

Or, if the suit be by the king, or for his benefit; as, in *quo minus*, &c. Ibid.

Or, by a gaoler against a prisoner for his victuals. Ibid. 9 Co. 87. b.

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Or, by an attorney against any one for his fees. Co. Lit. 295 a.

Or, by a servant, retained according to the statute for his salary. Ibid.

So, wager of law shall never be allowed where the declaration supposes a contempt, trespass, deceit, or wrong. Ibid.

As, in an action upon the case or trespass. Ibid. 2 Inst. 45.

So, it shall not be allowed upon a *quo minus*. Godb. 291.

So, in debt upon a joint contract, if one pleads *nil debet*, the other shall not wage his law. R. Cro. El. 646.

[\*] If the defendant come to wage his law, the court examines every point of the declaration. 3 Leo. 212.

And if it appears that the defendant is indebted, though it was agreed to be allowed out of a debt due to him from the plaintiff, he cannot safely wage his law. Ibid.

And he must have compurgators, which are usually eleven, and swear *de credulitate*. 2 Vent. 171. 2 Inst. 45.

But they may be a less number than eleven. 2 Vent. 171.

And with the plaintiff's consent, the oath of the compurgators may be omitted. 1 Vent. 4.

And when the defendant has his hand upon the book, the plaintiff may be nonsuited. 2 Vent. 171.

### (2 W 46.) An obligation for the same debt.

So, to debt upon a contract, the defendant may plead a bond given for the same debt; for this determines the contract. 2 Cro. 33. Cro. Car. 415. Vide ante, (2 G 12.)

So, to debt upon a bond against the heir, he may plead a bond by the executor or administrator in satisfaction of the same bond. Vide ante, (2 E 3.)

To debt by bill, by the st. 4 & 5 An. 16., he may plead payment generally.

But he cannot plead another bond given in satisfaction to debt upon bond. R. 3 Lev. 55. 1 Mod. 225. R. Lit. 58. R. 1 Brownl. 47. 71. Vide ante, (2 W 30.)

Nor, an agreement to accept a bond of the executor or administrator, and a bond given accordingly, to debt upon a bond by the testator, &c. R. 3 Lev. 56. Cont. per three J. 2 Mod. 137.

Nor, an agreement by parol to give a longer day of payment. R. Mo. 573. Cro. El. 697.

Nor, words by the plaintiff, which hindered the marriage the defendant undertook to procure, without shewing that the defendant did his endeavour. R. Cro. El. 694.

But in debt upon a contract, defendant cannot traverse the contract; for this amounts to *nil debet*; and therefore, he cannot say that the contract was for a less sum, or another thing, &c. R. Dal. 49.

### (2 W 47.) Upon a demise.—*Nil debet*.

To debt for rent upon a demise the defendant may plead *nil debet*. Win. Ent. 225.

Or, levy by distress. Dy. 20. b. 1 Ed. 4. 3. b. Vide ante, (2 V. 14.)

And upon levy by distress *et sic nil debet*, if the issue is upon the *nil debet*, a release, payment, &c. which proves nothing due, will be allowed in evidence. Per Holt, 1 Sal. 284.

**(2 W 48.) Nil habet in tenementis, or non demisit.**

If the demise be by deed-poll, or by parol, the defendant may plead *nil habet in tenementis*. Co. Lit. 47. b. 2 Vent. 251. Tho. Ent. 153.

[\*]Or, may plead *non demisit*, and give the other matter in evidence. Co. Lit. 47. b.

Or, if the plaintiff demised by parol, he may give in evidence upon *nil debet, quod nil habuit, &c.* 4 Mod. 254. Per Holt, 13 W. 3. (Vide 1 Ld. Ray. 746.)

Or, if the demise is by writing, if the plaintiff was not in possession. Per Holt, 13 W. 3. (Vide 1 Ld. Ray. 746.)

But he cannot plead *nil habet in tenementis*, or *non demisit*, if the demise is by indenture. Co. Lit. 47. b. R. 3 Lev. 146. [Com. 391. 6 T. R. 62.]

In an action brought on the indenture by the assignees of the lessor, (a bankrupt,) the defendant cannot plead this plea. 7 T. R. 537.

Nor, traverse the demise. R. 2 Cro. 73.

Nor, can he plead *nil debet* to part, and *nil debet in tenementis* to other part; for this will be double. R. 4 Mod. 254.

*Nil habuit in tenementis*, is a bad plea to *assumpsit*, for the use and occupation in lands; and in debt for rent on deed-poll, it must be, plaintiff had nothing at the time of action or at any other time. 1 Wils. 314.

If the defendant pleads *nil habet* to debt for rent upon a lease by indenture, the plaintiff may demur; for the estoppel appears upon the record. R. 1 Sal. 277. R. 3 Lev. 146.

Otherwise, if the estoppel does not appear; for he ought by replication to shew the estoppel, and rely thereon. R. 1 Sal. 277.

If two demises are alleged, *tempore demissionum prædict. nil habuit* is bad; for he ought to plead distinctly to each demise. R. 2 Vent. 253. 271. 4 Mod. 76. Skin. 307.

So, in covenant for payment of rent-arrear, the defendant cannot plead *nil habet in tenementis*. 2 Vent. 69.

To an action by a lessor for a breach of covenant, the lessee cannot plead in bar that the lessor had only an equitable estate in the premises, for that is tantamount to a plea of *nil habuit in tenementis*. 8 T. R. 487.

But, semble, the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken, because an interest passed by the lease. Ibid.

But to debt for rent, *riens in arriere* is a good plea. Cowp. 588.

So, in bankruptcy of the defendant. Semb. 1 T. R. 91.

The plaintiff replied that A. seised in fee by fine conveyed to him. Tho. Ent. 153.

The plaintiff by his replication to *nil habet, &c.* ought to shew what estate he has; for it is not sufficient to say generally that he has a good title or estate. R. 3 Lev. 193. R. 2 Cro. 312. Yel. 227. 2 Bul. 41. Adm. per C. B. M. 6 Geo.

So, in covenant for non-payment of rent, if the defendant pleads *nil habet, &c.* R. 3 Lev. 193.

But it shall be aided after verdict. R. 2 Cro. 312. 1 Mod. 292. R. Yel. 227.

And since it has been resolved and affirmed in error, that a general replication that A. having title leased to the plaintiff, without shewing what title A. had, is sufficient. 2 Vent. 252. 271. 4 Mod. 78. R. in C. B. H. 6 Geo.

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If in debt for rent against defendant as assignee of a term, he pleads he has made a further assignment before the time for which the rent is [\*]demanded, and plaintiff replies *non assignavit*, he cannot give fraud in evidence. Str. 1221.

There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither take possession of the premises nor receive the lease. 1 Bos. & Pul. Rep. 21.

Quære. Can the replication *per fraudem* to a plea of assignment be good in any case where the party assigning derives no benefit from the premises? Ibid.

### (2 W 49.) Tender.

So, the defendant may plead a tender of the rent at the day, and always ready. 2 Mod. Int. 236. Lut. 367. Vide ante, (2 W 28.)

But if he does not plead a tender upon the land at the last hour before sun-set, &c. it is bad. R. 2 Cro. 423.

Yet, a tender afterwards to the person, and refusal supplies the want of tender at the last hour, &c. R. Lut. 593.

So, he need not say precisely how long before the sitting, if he was there before, and staid after. R. 2 Cro. 499.

So, if he says that he was ready to pay from sun-rise to sun-set, it is sufficient, without saying *quod obtulit*. R. Ray. 419.

### (2 W 50.) Entry and expulsion.

So, the defendant may plead an entry by the lessor and expulsion of the defendant. 1 Sand. 203. 2 Mod. Int. 235.

So, eviction by a stranger. 2 Vent. 68.

So, an extent or taking in execution upon an *elegit* against the lessor before the rent became due. R. Cro. El. 308.

So, to debt upon a lease at will *quod non occupavit*. Per Fitzh. Dy. 14. a.

But expulsion or eviction will be a plea only as to rent incurred afterwards. 2 Vent. 68.

And therefore, where the plaintiff alleges enjoyment, if the defendant pleads eviction he must traverse the enjoyment. Ibid.

So, it is no plea in debt for rent upon a lease for years, *quod non habuit aut occupavit*. R. Dy. 14. a.

In debt for rent; that A. a stranger, before rent due, entered and turned defendant out of possession, and stills keeps him out; and that A. at the time of his entry, was and now is seised in fee, is not a good plea; he must shew a higher title. Fort. 360.

That A. at the time of the lease was and is seised in fee, is bad; for it must be pleaded as prior. Fort. 360.

That A. having a prior and better title, evicted defendant, is not sufficient; defendant must shew what evictor's title was. B. R. H. 171.

Defendant must shew that evictor had a title to enter. Ibid.

Must shew by what process he was evicted. Ibid.

### (2 W 51.) Pleas to debt on escape.

To debt for an escape, defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept; plaintiff in his replication admitted the negligent escape and voluntary return, but alleged that the prisoner had not been safely kept since that time; having again escaped, [\*]which was a different escape from that mentioned in the plea, and the same for which the action was brought; defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication, as to a new as-

[\*402] [\*403]

signment, a negligent escape, voluntary return, and safe keeping since, in the same manner as in the plea: this latter part of the rejoinder the court refused to strike out on motion, but held it bad on special demurrer. 1 Bos. and Pull. Rep. 413.

A plea, that if the prisoner escaped several times, (without specifying them,) he returned as often, is bad. Ibid.

### (2 W 52.) Judgment in debt.

If the plaintiff declares in debt upon a contract for delivery of goods; the judgment shall be conditional, as in detinue, viz. so much corn, &c. or the value. R. 11 H. 7. 5. b. Vide ante, (Z 1.)

So, if the declaration is for 40 pieces *monet. forinsecas ad val. 40l.* the judgment shall not be for the debt, but for so many pieces, and there shall be a writ of inquiry as to the value. R. Cro. El. 536.

{ In debt for a penalty given by statute, the plaintiff may recover a less sum than the sum demanded. Perrin v. Sikes, 1 Day, 19. }

### (2 X) PLEADING IN DETINUE.

#### (2 X 1.) Process.

Detinue may be sued in the county by *justicies*, as well as debt. F. N. B. 138. B. Vide ante, (2 W 1.)

Or, may be sued in C. B.

And upon the pretence of privilege in B. R. (in all cases except in detinue for charters, which concern the freehold, which shall be only in C. B.) 4 Inst. 71. F. N. B. 138. C.

But if detinue for charters is brought in any other court than C. B. a *supersedeas* lies. F. N. B. 138. C.

When detinue lies, vide Detinue, (A.)

When detinue for charters, vide Charters, (B 1.)

The process in detinue is summons, attachment, and distress. F. N. B. 138. B. 139. A.

And by the st. 25 Ed. 3. 17. in detinue for chattels, the same process as in account; and therefore process goes to outlawry.

But in detinue for charters, which concerns the realty, no process runs to outlawry. 44 Ed. 3. 41. b. Co. Lit. 280. b. Dy. 223. a.

#### (2 X 2.) Declaration.

The declaration in detinue shall be grounded upon bailment, or upon *devenerunt ad manus*. Co. Lit. 286. b.

Or, upon goods lost and found. Willes, 118.

Upon a special bailment, it may be necessary to state it specially. 1 New Rep. 145. 146. 148.

But it is not in issue upon *non detinet*. R. 1 New Rep. 140.

If the statement is, that they came by finding, proof that they came by delivered, will be of no consequence on *non detinet*. R. 1 New Rep. 141.

And query if the finding is traversable.

Proof that they came to the defendant by wrong, would support an allegation of their coming by finding. R. 1 New Rep. 140.

[\*]The declaration averred that they came by finding *non detinet*; it appeared plaintiff delivered the defendant the goods to work upon, and he refused to deliver them back, and defied plaintiff because he was under age; the court held that if the finding were material, it was proved, because as defendant was under age, he had not contracted as to the goods, and had therefore obtained them by wrong; and they al-



so held that if the finding could be put in issue, it was not so upon *non detinet*. 1 New Rep. 140. P. C.

And the declaration should state a request on the defendant by the plaintiff to deliver, &c. Ibid.

The declaration must describe the goods demanded so certainly that they may be known to be delivered to him in specie. Co. Lit. 286. b.

And therefore, detinue for money at large is not good; for it cannot be known. Ibid. R. Cro. El. 457. 1 Rol. 606. l. 20.

Nor, for corn out of a sack or bag. Co. Lit. 286. b.

So, he must shew the value of each particular by itself, and not of altogether. 2 Rol. 96. Vide infra.

In detinue, the several things sued for need not be separately valued in the declaration. 2 Blk. 853.

In detinue for the title deeds to real property, the plaintiff must disclose his title. 1 N. R. 140.

But it lies for money in a bag not sealed. 1 Rol. 606. l. 12. 14.

Or, for money not in a bag, if it is taken in sight of another. Ibid. l. 16.

Or, for a particular piece of gold, or for so many ounces. Ibid. l. 25. Yel. 81.

Or, for twenty quarters of barley or wheat. Bro. Detinue, 51.

The declaration may mention the value of every particular, or of all in gross. Bro. Detin. 4. 48. R. 1. 3. 3. Vide supra.

### (2 X 3.) Pleas in detinue.—*Nil detinet*.

To an action of detinue the defendant may plead *nil detinet*.

### (2 X 4.) Wager of law.

So, in detinue generally, he may wage his law. Co. Lit. 295. a. Vide ante, (2 W 45.)

Though it be upon bailment by another hand, for by whom bailed is not traversable. Co. Lit. 295. a.

So, where he has a right to the deed, though he has it in his custody. R. Dal. 106.

So, in detinue of charters, or a box of charters, without shewing any charter in certain. R. 19 H. 6. 9. b.

But, in detinue of charters, he cannot wage his law. Co. Lit. 295. a.

If he shews any charter in certain. 19 H. 6. 9. b.

Though it be for an indenture of demise for years. Co. Lit. 295. a.

### (2 X 5.) *Uncore prist*.

So, he may plead *uncore prist*. 1 Bro. Ent. 149.

### [\*](2 X 6.) Delivery to him to whose use, &c.

So, he may plead delivery to A. to whose use they were bailed.

Though the delivery was after the action brought. F. N. B. 138. M.

### (2 X 7.) Release.

So, a release after bailment by the husband of the plaintiff. R. Dal. 30.

### (2 X 8.) Garnishment; when allowed.

So, the defendant may plead that the goods were delivered to him by the

plaintiff, and A. *exquis manu* upon a condition which he knew not was performed, and pray that A. be garnished. Sav. 29.

And it will be good without saying what was the condition. 1 Rol. 733. l. 4.

So, if both bring several detinues for the same goods, the defendant may plead to both, that they were delivered upon condition, &c. and pray that the plaintiffs may interplead. 1 Rol. 734. l. 10.

Though one declares upon bailment, the other upon trover. Ibid. l. 40.

Whether the delivery were joint or several. 1 Rol. 733. l. 50.

Though the delivery was by a corporation and others, and the defendant is one of the corporation. 1 Rol. 732. l. 15.

So, if A. bails goods of C. to B. in detinue by C. against B., he may plead bailment by A. to be re-delivered to him, and pray that he may be garnished. Mod. Ca. 216.

If the defendant prays garnishment, he ought to profer the goods in court.

And the good antiently remained in court till the plea determined; but now they remain with the defendant till trial. 1 Rol. 736. l. 5.

And the defendant cannot afterwards deliver them to either party without the award of the court. 1 Rol. 736. l. 15.

Nor, can he plead any plea afterwards; for he is out of court, except for the delivery of the goods, and therefore not demandable till judgment, when he must deliver them. Ibid. l. 25.

But the court may require sureties of the defendant for the goods. Ibid. l. 10.

### (2 X 9.) Process against garnishment.

After a prayer of garnishment a *scire facias* goes against the garnishee. 19 H. 6. 9. b.

And a *scire facias* ought to be awarded.

If a *scire facias* goes against two garnishees, and one is returned, served, and the other, dead, another *scire facias* goes against the executors of the deceased, and *idem dies* shall be given to him, who was served and appeared. R. 19 H. 6. 9. b. 55 b.

If the garnishee appears, he may imparl.

If the plaintiffs interplead, they ought to do it in proper person.

Rol. 734. l. 20.

[\*]The interpleading shall be upon the original of the oldest date. 1 Rol. 735. l. 45.

Though the other counted first. Ibid.

But if both originals are of the same date, it shall be upon that whereon there is the first count. Ibid. l. 53.

Or, the court may assign upon which the interpleader shall be. 1 Rol. 736. l. 2.

### (2 X 10.) Pleas by him.

A garnishee can regularly plead nothing except conditions performed. 1 Rol. 732. l. 35.

Or, a release from the plaintiff. 1 Rol. 733. l. 15.

But the garnishee cannot plead that he himself alone delivered. 1 Rol. 732. l. 50.

That the delivery was to the defendant and a stranger. 1 Rol. 733. l. 2.

Or, upon other conditions that the defendant has mentioned; for, if the

defendant mistakes the conditions, he will be charged by oath, and therefore the garnishee has no mischief. 1 Rol. 732. l. 50.

But if the defendant does not mention the conditions, the garnishee may, and the plaintiff may allege other conditions, and traverse those mentioned by the garnishee. 1 Rol. 733. l. 5.

So, the garnishee cannot plead bailment in another county. Ibid. l. 7.

Or, an agreement by the plaintiff that he should have the goods upon a condition which he has performed. Ibid. l. 10.

Or, performance of the condition in the bond for which detinue is brought. 1 Rol. 732. l. 37.

So, in detinue of a deed the garnishee shall not plead a bar to the original deed : as, *non est factum*, within age, &c. 1 Rol. 733. l. 25.

### (2 X 11.) When garnishment not allowed.

But garnishment shall not be allowed if the defendant acknowledges the action of one plaintiff, though the plaintiff in another action prays it ; for it shall be granted only at the request of the defendant, being for his safety. 1 Rol. 734. l. 10.

So, it will be a good counterplea of the garnishment, if the plaintiff says the delivery was by him alone. 1 Rol. 732. l. 30.

So, if there are two *detinues*, the defendant cannot pray an interpleader, if both are not returnable the same day. 1 Rol. 734. l. 18.

So, if one demands charters upon bailment, the other upon title. Ibid. l. 40.

### (2 X 12.) Judgment in detinue.

The judgment against the defendant in detinue shall be for recovery of the thing detained *vel valorem inde*, and costs. Per Frowick, Kelw. 64. b.

And if judgment be upon confession, *non sum informatus*, demurrer, &c. a writ of inquiry shall be awarded to inquire of the value. Vide ante, (Z 1.)

[\*]And after judgment, if a *distringas* goes *ad deliberandum bona*, and the defendant does not, the plaintiff shall have damages taxed by the inquest, so that it lies in the defendant's election to deliver the goods, or the value. Per Frowick, Kelw. 64. b.

So, after judgment against the defendant, the plaintiff may have a *distringas*, or a *scire facias* against the defendant for the thing detained. 1 Rol. 737. l. 35.

If detinue be for charters, the verdict must find some damages, which the plaintiff shall recover, if the charters are lost. Semb. Sav. 29.

If the plaintiff recovers after interpleader by the garnishee, there shall be judgment against the defendant for recovery of the thing detained. 1 Rol. 736. l. 46.

And there may be a *scire facias* or *distringas* for it against the defendant. 1 Rol. 737. l. 35.

So, the plaintiff may recover damages against the garnishee for delay after the writ purchased. Ibid. l. 21.

Though the recovery is upon a demurrer or default, as well as upon a verdict. Ibid. l. 10.

And he may recover more damages than are alleged in the declaration ; for it was not against him. Ibid. l. 25.

But if the garnishee does not appear after *scire feci* returned against him, the plaintiff shall not recover damages against him. 1 Rol. 733. l. 35.

So, if the garnishee appears, and the plaintiff and defendant both make default, there shall be judgment for the garnishee. Ibid. l. 30.

## (2 Y) PLEADING IN DOWER, DOWER UNDE NIL HABET.

### (2 Y 1.) The process.

Dower may be recovered by writ of dower *unde nihil habet*, or by right of dower. F. N. B. 148. a.

Writ of right in dower, vide Reg. 3. a.

Dower *unde nil habet*. Reg. 170. a.

Writ of dower *unde nil habet* lies only against the tenant of the freehold, or guardian in chivalry. F. N. B. 148. A.

And shall be sued in C. B. or in the county by *justicies*. Ibid.

Or, upon a special custom by plaint. Dub. 1 Vent. 267. Ray. 233.

But it shall not be sued by plaint without a special custom. Ibid.

The process in C. B. is summons, grand and petit cape. F. N. B. 148.

By custom there shall be a resummons. 2 Sand. 43.

And in the hustings in London there are three summonses. Co. Ent. 176. b.

At the return of the summons the defendant may cast an essoin.

By the st. 51 H. 3. of return in dower. 32 H. 8. 21. and 16 Car. 6. the writ of dower *unde nil habet* coming in, and being returnable on any common return day, there shall be day given in it till the fifth common return-day next ensuing inclusive.

[\*]If the tenant casts an essoin at the return of the summons, it must be entered upon the essoin-day of the same return.

And if no essoin be then entered, upon the day of exceptions the demandant may enter a *ne recipiatur*. (Vide Comp. Att. 72. 196. Edit. 1695.)

There are five essoigns; 1. *de servitio regis*; 2. *in terra sancta*; 3. *ultra mare*; 4. *de malo lecti*; 5. *de malo veniendi*, which is called the common essoin. 2 Inst. 125.

By the common law, he who casts an essoin must swear the cause to be true. 2 Inst. 137.

But by the st. Marl. 52 H. 3. 10. he need not as to a common essoin (for the general words of the statute are restrained to this). Ibid.

And by the st. of essoins, 12 Ed. 2. *essoign de servitio regis* is ousted in dower.

If any essoin is cast, except the common essoin, the demandant will be delayed for a year and a day. 2 Inst. 137.

If the common essoin is cast, the demandant must adjourn the essoin to the fifth return after. (Vide Com. Att. 204.)

At the return of the summons; or, if an essoin is cast, at the day given by the adjournment of the essoin, if the tenant does not appear, a grand cape issues. (Vide Com. Att. 203, 204.)

Proclamation must be made 14 days before the return of the summons, or the grand cape shall be set aside. Barnes, 1.

And if *nulla tenementa*, &c. be returned, a *testatum grand cape*.

So, if the sheriff does not return his writ, an *alias grand cape* shall be awarded at the return of the *grand cape*: if the tenant alleges that he was not able to come, it does not save his default. R. 3 Leo. 2.

[\*408]

But, if no summons is returned, a *grand cape* cannot issue. Noy, 22.

If the tenant appears upon the *grand cape*, he may wage his law of *non summons*. Co. Ent. 175. b.

And he shall have day in the same or the next term for 15 days at least to wage his law. (Vide Comp. Att. 72.)

If he does not wage his law, there shall be final judgment against him.

If he wages his law, and the demandant holds to the default of the tenant, the writ shall abate. (Vide Comp. Att. 204.)

So, if the demandant holds to the default, and the tenant is an infant who cannot wage his law of *non summons*.

But when the tenant wages his law of *non summons*, the demandant may release the default. Co. Ent. 176. a. 1 Bro. Ent. 203.

### (2 Y 2.) Count in dower.

If the tenant appears upon the summons, or the adjournment of the *essoins*, or if he appears at the return of the *grand cape*, and the demandant releases the default, the demandant shall count. Co. Ent. 171. a. 176. a.

The count shall be of the third part of such a messuage, &c. ; for if it be of three messuages, &c. where there are several, and three is the third part of all, it is bad. 3 Lev. 169.

[\*]But it may be amended. Per two J. Lev. cont. 3 Lev. 169.

If dower is demanded of lands of the nature of gavelkind, it must be of a moiety *dum sola et casta*; and if the plaintiff demands a third part, it is a good bar that the land is gavelkind. R. 1 Leo. 133.

It must describe the lands so certainly, that seisin may be delivered by the sheriff; and therefore of a third part of three tenements, is bad. R. 2 Mod. Ca. 355.

If the plaintiff is not named, *quæ fuit uxor B.* in the first part of the writ, it is bad; though afterwards the lands demanded are called *terras B. quondam viri sui*. R. 2 Cro. 217.

### (2 Y 3.) View.

When the demandant has counted, the tenant may demand a view of the lands demanded. Co. Ent. 177. a. 47 Ed. 3. 6. a.

Or, if dower is demanded of a rent, of the land out of which it issues.

And a view shall be granted in dower *unde nihil habet*, as well as in right of dower. Cont. Dy. 179. a. Cont. 2 Inst. 481. 45 Ed. 3. 17. a. Acc. Rast. Ent. 231. a. Ash. Ent. 292. Clift. 299. Semb. cont. per C. B. M. 9 An.

And it may be demanded after a general imparlance, though it is safer to demand it before. Dy. 210. b.

But by the st. W. 2. 13 Ed. 1. 48. in dower, the tenant shall not have a view, if the husband of the demandant aliened to the tenant himself. 2 Inst. 481. 3 Lev. 169. Vide View.

So, if the husband died seised of the land. 2 Inst. 481. 3 Lev. 169.

If a prior writ of the demandant abated by a plea, which arose upon the view. 2 Inst. 480.

If dower is demanded of tithes. R. 2 Rol. 728. l. 45.

Or, of a thing certain: as, of the marshalsea. Ibid. l. 25.

If the tenant demands a view, when it is not allowable, the demandant may counterplead: as, if the demandant's husband died seised. Clift. 299. Rast. 231. b. 3 Lev. 168.



If the husband aliened to the tenant. 3 Lev. 220.

And it is sufficient to say *alienavit*. Ibid.

The counterplea prays that the view may be excluded ; but if it demands dower, it is not bad. R. 3 Lev. 169.

So, the demandant in the counterplea of the view may say that the tenant entered and continued the possession. Ash. Ent. 296.

And upon the counterplea issue may be taken. 34 H. 6. 10. b. Rast. 231. b.

If the tenant demurs to the counterplea, and it is adjudged against him, it will be peremptory.

After the return of the writ for a view, the tenant may have the common essoin.

So, the attorney of the tenant may be essoined. Co. Ent. 177. a.

And at the return of the view, or at the adjournment of the essoin, the demandant shall count *de novo*. (Vide Com. Att. 204.)

If after a view the tenant pleads in abatement to part, the demandant may abridge his demand. Vide Abatement, (A 1.)

[\*]So, though the tenant does not plead in abatement. Lev. Ent. 76. 2. Sand. 330.

What pleas may be after a view, vide Abatement, (I 25.)

#### (2 Y 4.) Pleas in dower.—In abatement.

To a demand of dower the tenant may plead in abatement : as, antient demesne. Ash. Ent. 297. Vide Abatement.

That the demandant took husband pending the writ. Co. Ent. 173. b.

That her husband was attaint. 1 Leo. 3.

Non-tenure. 1 Bro. Ent. 205. Rast. Ent. 225. a. Mo. 80. Dal. 100.

Or, non-tenure of part. Lut. 716.

So, the tenant may plead in abatement, that he holds jointly with A. not named. Rast. Ent. 225. b.

That the land is gavelkind ; so that a moiety ought to be demanded, when the declaration demands only a third part. R. to be a plea in bar. Sav. 91.

#### (2 Y 5.) In bar.—*Touts temps prist*.

So, the tenant may plead in excuse of himself, or in bar of the dower : as, he may confess the demand, and say *touts temps prist*. 1 Bro. Ent. 205. Co. Lit. 32. b.

And if the tenant pleads *touts temps prist*. the first day of the return of the summons, he shall be excused from damages. Ibid.

So, he may plead that the demandant abated, and was in by abatement till such a day, and afterwards *touts temps prist*. Lut. 715. Dal. 100.

Upon this plea the demandant may have judgment immediately, but shall lose her damages and mesne profits. Co. Lit. 32. b. 1 Bro. Ent. 205.

Or, if she had demanded her dower, she may plead the demand. Co. Lit. 32. b. Lut. 717.

Though the demand was by request *in pais*. Co. Lit. 32. b.

If the defendant pleads *touts temps prist*., and there is judgment ; though damages are given, it is no error, for perhaps there was delay. 2 Mod. Ca. 25.

[\*410]

(2 Y 6.) Detainment of charters.

So, the heir may plead detainment of charters, and always ready, *si, &c.* Rast. Ent. 224. b. Mo. 81.

So, detainment of charters as to parcel. Dal. 100.

So, a guardian in chivalry, in dower against him, may plead detainment of his ward. Hob. 199.

But a guardian cannot plead detainer of charters; for they do not belong to him. Co. Lit. 39.

Nor, the heir after imparlance. R. Sho. 271. 1 Sal. 252.

[\*]Replication.

To this plea the demandant may reply *non detinet*. Rast. 224. b. Mo. 81.

Or, that she is ready to deliver, and thereupon there shall be judgment for her immediately. Rast. Ent. 224. b. Hob. 199.

But, if a woman replies *quod non detinet*, and it is found against her, it will be a bar of dower. Hob. 199.

(2 Y 7.) *Ne unques seisie, &c.*

*Ne unques seisie que dower*. Co. Ent. 176. a. Clift. 303.

Or, *ne unques seisie* as to part, with another bar to the residue. Ibid.

*Ne unques seisie, &c.* and *ne unques accouple, &c.* cannot be pleaded in dower. 2 Blk. 1157. 2 Blk. 1207.

(2 Y 8.) Within age dowable.

That the demandant was under age dowable. 1 Bro. Ent. 204. Co. Lit. 33. a.

Replication.

To which the demandant replies, that she was of the age of nine years and an half. 1 Bro. Ent. 204.

(2 Y 9.) Husband alive.

So, the tenant may plead that the husband of the demandant is alive. 1 Bro. Ent. 205. Bend. pl. 131. R. 1 And. 20.

Replication.

To this plea the demandant replies, that her husband is dead, and thereon a day is given for proof of his death, which must be made in court by two witnesses at least. Bend. pl. 131. Dy. 185. a.

And at the same day the tenant may examine his witnesses that the husband is alive. Ibid. Mo. 14.

And if it appears to the court by witnesses that the husband is dead, the demandant shall have judgment immediately. Bend. pl. 131.

So, if the proof of the death is not direct, if there is no proof of his being alive. R. 1 And. 20. Mo. 14.

(2 Y 10.) *Ne unques accouple.*

So, the tenant may plead *ne unques accouple* in lawful matrimony. Co. Ent. 180. a.

## [\*]Replication.

And the demandant replies, that at B. in such a diocese, she was accoupled in lawful matrimony. Ibid.

If plaintiff replies a sentence in the spiritual court, in a suit by a third person against her for adultery, in which the deceased was no party, decreeing that she was the wife of the deceased, it is bad; for there can be no trial but by the bishop's certificate; and besides, this sentence is only evidence, and therefore cannot be replied. And this is the general issue, to which no new matter can be replied; and there must be such a replication as will join the issue, and awarding the writ to the bishop is the issue. 2 Wils. 118. 122. 127.

If this plea is in London, or other inferior court, it shall be removed to C. B. by *mittimus*; for no one except B. R. or C. B. or justices of gaol delivery, &c. can write to the bishop for his certificate. Co. Lit. 134. a. Co. Ent. 180. b. Vide Bastard, (D 2.)

Upon this plea a writ goes to the bishop to certify. Co. Ent. 181. a. 1 Bro. Ent. 204.

The lawfulness of a marriage in Scotland may be tried by a jury. 2 H. Bl. 145.

A replication to a plea of *ne unques accouple*, alleging a marriage in Scotland, may conclude to the country. Ibid.

And need not state that the marriage was had in any place in England, by way of *venue*. Ibid.

The plaintiff has the carriage of the writ; and if there be a default in him, the defendant shall not have it without notice to the plaintiff, or motion. R. 2 Jon. 38.

The bishop must return the fact, and not the evidence. Barnes, 1.

The answer of the bishop ought to be positive; for he is judge of it. Dy. 368. b.

And therefore he cannot return the special matter. R. Dy. 305. b.

And though he returns special matter, and concludes *et sic legitimo matrimonio copulati fuerunt*, it is not good. R. Dy. 313. 2 Rol. 591. l. 10.

If the bishop refuses a good certificate, he may be amerced. Dy. 305. b.

And it is no answer to say he was inhibited by the arches. 2 Rol. 592. l. 10.

Yet a certificate, that she was accoupled *in vero sed clandestino matrimonio*, is good. R. 2 Rol. 591. l. 25.

That he finds by good proof that she was accoupled. Ibid. l. 20. Dy. 368, 9.

If the certificate is insufficient, a new writ goes to the bishop. Towns. Jud. 96.

## (2 Y 11.) Elopement.

So, the tenant may plead an elopement by the wife during coverture. Co. Lit. 32. 1 Bro. Ent. 204. Dy. 107. a.

## [\*]Replication.

To which the demandant replies, that she did not elope. 2 Bro. Ent. 109.

That she was afterwards reconciled to her husband. 1 Bro. Ent. 204. Co. Lit. 32. b. Dy. 107. a.

And if the issue is upon the reconciliation, it is sufficient if the husband lies several nights with his wife, though she afterwards continues in adultery; for there may be several elopements. Dy. 107. a.

[\*412] [\*413]

**(2 Y 12.) Divorce.**

So, the tenant may plead a divorce *a vinculo matrimonii*.

**(2 Y 13.) Jointure.**

So, the tenant may plead that the demandant had a jointure. Co. Ent. 171. b. 172.

A jointure after coverture, to which the wife agreed after her husband's death.

And it is sufficient to plead a jointure generally, without saying that she agreed; for it shall be intended, till it is alleged on the other side, that she refused. Per two J. Ward. cont. Hob. 71. 104.

**Replication.**

The demandant may reply, that the estate was not made to such uses. Co. Ent. 172. b.

That it was ~~not~~ for a jointure. Co. Ent. 172. a.

And a devise, if it is not expressly made for a jointure, cannot be averred to be a jointure. Mo. 31. Vide Dower, (E 1.)

**(2 Y 14.) Fine or recovery.**

That the husband levied a fine, and the demandant made no claim within five years. Co. Ent. 171. a. Dal. 107. Clift. 305.

That husband and wife levied a fine.

Or, suffered a common recovery.

**Replication.**

The demandant by replication may say that she sued for her dower within five years. Co. Ent. 171. b.

So, a fine by husband and wife, *come ceo* that he has of the gift of the husband, of lands limited for a jointure after marriage, does not bar her of dower; for her election does not come till her husband's death. 1 Leo. 285.

**(2 Y 15.) Assignment of dower.**

That lands were assigned for dower by the heir. R. Mo. 26.

Or, by himself who was assignee of the husband.

That a rent or annuity was assigned for dower, and accepted. Mo. 59. Cro. El. 451.

[\*] That her husband devised to her lands in lieu of dower, which she accepted. Bro. V. M. 266. Semb. 1 Leo. 137.

That 20 acres of wheat, common of pasture or other profit out of the soil, was assigned. Mo. 59.

But an assignment by the husband's executor is no plea. R. Mo. 26.

If the tenant pleads an assignment of rent, &c. he must shew that he had a sufficient estate out of which the rent might be assigned. R. 2 Leo. 10.

That the assignment was absolute; for upon condition, &c. is not sufficient. C. Cro. El. 452.

And he must plead *quod assignavit*; for *quod dedit et concessit* is not sufficient; though they are the words of the deed. Ibid.

**(2 Y 16.) Term for years *in esse*.**

That there was a demise for years before coverture, rendering rent, and praying that the demandant may be endowed of the reversion and rent.

But if a term for years is not pleaded, it shall not be allowed ; as, a prior title, in ejectment by tenant in dower after her recovery. 1 Sal. 291.

**(2 Y 17.) Release.**

That the demandant has released her dower to the tenant of the freehold.

But a release to the tenant in possession, without saying *tenen liberi tenementi*, is no plea. R. 2 Cro. 151.

**(2 Y 18.) Voucher in dower.**

So, the tenant may vouch the heir.

And if the heir enters into warranty, and says *riens per discent*, the demandant shall have judgment against the tenant immediately. R. Mo. 25.

So, though the heir has only an estate tail. Dub. Ibid.

So, by the st. 32 H. 8. 1. if tenant by knight's service devises, (which will be void for a third part,) dower shall be recovered out of two parts, where the heir enters generally with the devisee, or makes partition with him. 2 Leo. 131.

Otherwise, if the heir enters into a third part in severalty. Ibid.

**(2 Y 19.) Judgment in dower.**

If the tenant appears and makes default in the same term, there shall be final judgment against him. 2 Sand. 46.

If he confesses the action, or *nihil dicit*, or pleads *non informatus*, there shall be judgment thereon. 1 Bro. Ent. 202. 204.

If the tenant makes default in another term, a *petit cape* shall issue. 2 Sand. 46. 1 Vent. 60.

And if he cannot save his default upon the return of the *petit cape*, there shall be final judgment against him.

[\*]So, if the tenant pleads that the husband is alive, and the demandant at the day for trial is ready with her proofs, there shall be final judgment against the tenant, if he makes default. 2 Inst. 80.

If the demandant is not present with her proofs, there shall be a *petit cape* awarded. Ibid.

So, if the tenant makes default at a trial by jury, there shall be a *petit cape* against him, and if he does not save his default, there shall be final judgment against him.

So, there shall be judgment by default, though the tenant is an infant. R. 2 Cro. 111.

The judgment in dower shall be *quod querens recuperet seisinam de 3 parte tenementor. petit*.

By the st. Mert. 20 H. 3. 1. *si recuperaverit tenementa de quibus vir obiit seisitus, tenens reddat damna, viz. valorem dotis a tempore mortis viri usque ad diem, quo, per judicium curiæ, seisinam suam recuperaverit*.

And therefore after judgment for seisin, and *habere facias seisinam* awarded, if the demandant makes a suggestion upon the roll, that her husband died seised, there shall be a writ to inquire what damages, &c. Clift. 302. 1 Lev. 38.

[\*415]



And upon the return of the inquisition, there shall be judgment *quod recuperet valorem* and her damages. Town. Jud. 101. Ray. 366. 2 Mod. Ca. 25.

Or, the jury, who try the issue, may also inquire of the value of the damages.

Or, the demandant may remit the value and damages, and have an *habere facias seisinam* immediately. Town. Jud. 100.

Or, if she remits the damages, and the inquisition is afterwards annulled, she may have another inquisition for the value of the land. R. Ray. 366.

If the inquisition finds that the husband did not die seised *prout eis constare poterit*, there shall be a new inquisition. 4 Leo. 21.

If the demandant suggest that her husband died seised, where he was seised in fee and afterwards granted a rent-charge, and retook an estate-tail, she will be subject to the rent; for she is concluded by her own suggestion, and cannot say that she has not dower out of the second estate. Co. Lit. 33. a.

Damages shall be given *a morte viri*, though demandant has not shewn any demand of dower *in pais*, unless the tenant pleads *touts temps prist*. B. R. H. 19.

Damages shall be given till the demandant has seisin, though she had a writ of seisin a year before. Ibid.

If the jury give damages *a morte viri* to the time of the inquisition, though it is after the judgment, it will be good. R. 1 Leo. 56.

So, though they give damages beyond the annual value of the land. Ibid.

But the demandant shall not recover the value or damages, if her husband did not die seised of the freehold and inheritance. Co. Lit. 32. b.

Nor, in a writ of dower *ad ostium ecclesie ex assensu patris*, right of dower, &c. but only in dower *unde nil habet*. Co. Lit. 32. b.

[\*]Or, if the heir comes the first day upon summons, before any demand of dower. Ibid. Vide ante, (2 Y 5.)

Nor, if she has dower by the assignment of the heir, in Chancery, &c. for she must recover by plea. Co. Lit. 33. a.

So, the demandant, upon judgment by default after a *grand cape*, shall have no damages upon the inquisition found, if there was no notice of executing the writ of inquiry. R. 3 Lev. 409.

On a writ of inquiry, the damages should only be the third of the value of the land, after deducting reprises, from the death to the time of awarding inquiry. Barnes, 234.

So, if the demandant has judgment and seisin, and afterwards upon the inquisition the jury give damages for the rent after seisin till inquisition taken, it will be error. R. 1 Leo. 56.

So, if the tenant dies after judgment in dower, and writ of seisin executed, the demandant shall not have a *scire facias* for inquiry of damages after the death of the tenant, against his heir or terre-tenants. R. 3 Lev. 275. R. 1 Sid. 188. 1 Lev. 38.

So, if there is error of a judgment in dower, and it is affirmed, and before the writ of inquiry executed the demandant dies, her executor or administrator shall not have a *scire facias* for the damages. R. 1 Sal. 252. 3 Lev. 275. Sho. 97. 3 Mod. 281. Carth. 135.

So, if the sheriff, upon a writ of seisin after judgment in dower, assigns 20 acres to the demandant, whereof 10 are the lands of a stranger, and she enters and accepts the residue, she cannot afterwards avoid it by *scire facias*: though it is not a third part. R. Mo. 679.

If dower is demanded of meadow, pasture, &c. the sheriff may assign all meadow, &c. for dower. R. Mo. 12. 19.

But if the demand is of three manors, the sheriff cannot assign one manor but must assign a third part of each. Ibid.

## (2 Z) PLEADING IN EJECTMENT.

### (2 Z 1.) Declaration.—Must demand a thing certain.

By whom it lies, vide Ejectment, (A—B).

Ejectment is now usually brought for trial of the title to lands, &c.

The same precision and exactness is not necessary in an ejectment as in a præcipe. 1 Burr. 623. 5 Burr. 2672.

Nor, so much strictness as was formerly required in the ejectments ; nor such exactness that the sheriff may know without any other information : for plaintiff is to shew and take possession at his peril. Ibid.

And it lies of a manor, messuage, so many acres of land, meadow, pasture, wood, &c. 11 Co. 55.

So, *de una domo*. R. 2 Cro. 654. R. Noy, 37. Cont. 2 Rol. 486.

*De cotagio*. D. 1 Lev. 58. R. Cro. El. 818.

*De coquina*. R. Noy, 109.

*De cubiculo*. D. 1 Noy, 109. 3 Leo. 210.

*De stabulo*. R. 1 Lev. 58.

*De romea*. R. 3 Leo. 210.

[\*]Of a prebendal stall, after collation to it. 1 Wils. 14.

Of the part of a house, if by the pleading it appears what part. Str. 695.

Of part of a house ; as, *locum vocatum* a passage-room, and ascertained in what part. Ld. Raym. 1470.

So, it lies *de pomario*. R. Cro. El. 854. R. 2 Cro. 654. R. Noy, 37. D. 1 Lev. 58. Palm. 537.

Of *parcella areae*, *parcella pomarii*, *parte piscinae*, if sufficiently described by the abutments. Ld. Raym. 1470.

Of *clauso pasturae vocat.* five acres, containing five acres. Ibid.

*De virgata terræ*. Ow. 18.

*De villa*. Dub. Sho. 49.

So, it lies of tithes, and *portione decimarum*. Hard. 57.

So, of small tithes. R. Ld. R. 789.

*De herbagio*. Hard. 330.

Or, *prima tonsura*. R. Cro. Car. 362.

*De pastur. pro 100 ovibus*. Dal. 95.

*Pro communia pasturae* generally, if joined with lands, will be good after verdict, though the kind of common not expressed. Str. 54.

Of messuages and lands, with common of pasture, *cum pertinentiis*, good ; for it shall not be taken for common in gross, and the *cum pertinentiis* shall relate to the land. B. R. H. 127.

For cattle-gates in Yorkshire. Str. 1063.

For a beast-gate in Suffolk : it imports land and common for one beast. Str. 1064. Andr. 106.

Cattle-gates shall be understood to mean common of pasture for cattle ; and after verdict, for common appurtenant. B. R. H. 167.

Of a coal-mine. R. 2 Cro. 150. R. Noy, 121. [Vide Doug. 305.]

Of a boiery of salt. D. 2 Cro. 150. Noy, 132. 1 Lev. 114.

Of land and a coal-mine in the same land. for it is no *bis petit.* in a personal action. R. 2 Cro. 21.

*De subsecro*. R. 2 Cro. 488.

It lies for *alter carr.* in Norfolk. Str. 1063.

*De exadum fabricæ*. Hard. 38.

[\*41:]

*De terra montana.* Hard. 58. R. cont. 2 Rol. 167. 189.

Of one hundred acres of mountain, good in Ireland, where mountain describes the quality rather than the situation. Str. 71.

(After verdict and affirmance of judgment there) these descriptions were held sufficient in Ireland.

In the county of R. without naming a vill.

Town and tenement of B. and the fairs and markets thereto belonging.

Quarter.

Part of S. M. and D.

A large deer-park in the county of R.

A small park or field in the possession of A. (not saying where.)

And although the quantity and quality of the land is not specified. 1 B. M. 623.

Of so many acres of bog. R. Cro. Car. 512.

It lies by the owner of the soil, for land, part of the highway; for he has a right to all above and under ground, except only right of passage, and ought to have specific remedy to recover the land itself. 1 B. M. 133.

Land is a sufficient description, though part of a house is built by encroachment upon it; for plaintiff claims the land, not the nuisance; and more latitude is allowed in ejectments (where sufficient certainty is enough) than in real actions. Ibid.

[\*] But it does not lie where no certainty appears, whereof the sheriff can deliver possession: as, if the declaration is *de tenemento*. Mar. 96.

*De repositorio.* Per three J. Mar. 96. Dub. Cro. Car. 555. Jan. 454.

*De messuagio sive tenemento.* R. Noy, 86. D. 2 Cro. 125. 621. Cro. Car. 188. R. 3 Leo. 228. R. 3 Mod. 238. R. after verdict. 1 Sid. 295.

For a messuage, garden, and a tenement. Str. 834.

For one messuage or tenement. Barnes, 173. 3 Wils. 23. { Vide Den v. Woodson, 1 Hayw. 24. }

But if it be brought of a messuage and tenement, the court will give leave to strike out the words and tenement. 3 Wils. 23.

Where the plaintiff declared for a messuage and tenement, the court permitted the lessor, pending a rule *nisi* to arrest the judgment for the uncertainty, to enter the verdict according to the judge's notes, for the messuage only, and that without releasing the damages. 8 East, 357.

Though it was once held that an uncertain description of the premises in ejectment, thus, "messuage and tenement," or, "messuage or tenement," is used by verdict. 1 T. R. 11. Yet the contrary was afterwards adjudged, on a review of the authorities. 1 East, 441. 3 Wils. 23.

So, for a messuage in A. or B. or one of them. Barnes, 184.

For 20 acres of land, &c. in the several towns of A. B. and C., without specifying the quantity in each, good. Ld. R. 588.

*De messuagio et terris eidem spectan.*

*De pecia terræ.* Ow. 18. Mo. 422. 702.

*De pecia terræ vocat.* B. Ow. 18. Mo. 422. 702.

Or, continen. 20 acr. R. Jones, 400. Vide infra.

*De clauso terræ*, containing three acres. R. 11 Co. 55. Dub. Cro. El. 539. but R. cont. Cro. El. 235. R. 2 Cro. 435. D. 2 Cro. 654. 1 Lev. 58. R. 3 Lev. 37. Cont. Hard. 57. Vide infra.

It is an established rule in ejectments, that the action will not lie for a close containing so many acres without describing the nature and quality of the lands. 3 T. 27.

*De tali parte messuagii in occupatione D. quæ stat super ripam.* R. Mar. 97, 8.

Of common in gross. D. P. 2 Ja. B. R.

Nor, of a fishery, rent, or other profit *aprendre*. R. Cro. Car. 492.

Ejectment or trespass will not lie for herbage and pannage. Dougl. 304.

So, it does not lie without shewing the quantity and quality of the land: as, how many acres of land, meadow, and pasture, &c. R. 11 Co. 55. 1 Sal. 254.

And so much by estimation is not sufficient. Ley. 82. R. Cro. Car. 573.

It does not lie *de omnibus decimis in D.* without saying, whether they are tithes of corn, &c. Mo. 837.

Nor, *de quarta parte prati*, without saying how much the whole contains. 1 Lev. 213.

Nor, *de castro, villa, et terris in K.* Yel. 118.

Nor, *de quinque clausis vocat. F. continent. 3 acr. terræ et pastur.*, without saying how much land or pasture each contains. R. 4 Mod. 97. 1 Sal. 254. Sho. 338. Vide infra.

Nor, *de 300 acres vasti.* R. Hard. 57, 58.

[\*]So, it does not lie *de rivulo*, or *aquæ cursu*; for it must be so many acres of land *aqua coopert.* R. Yel. 143.

Nor, *de pannagio*; for this is only a privilege to take pannage. 1 Lev. 213. 1 Sid. 417. [Dougl. 304.]

Yet, it seems sufficient, if so much certainty appears, upon which the sheriff can deliver possession: as, ejectment *de pecia terræ vocat. B.*, or *clauso terræ vocat. B.* R. 2 Cro. 435. 3 Lev. 97. Vide supra.

*De 2 clausis terræ continent. 3 acr. terræ*, though it is not said how much each close contains. Per three J. 2 Cro. 435.

*De quodam loco vocat.* the vestry. R. 3 Lev. 96.

*De terris de K. continent. 90 acras.* Dub. Sho. 49.

So, *demineris carbonum in A.* without saying how many, if it be the usual phrase of the country. R. 4 Mod. 143. Sho. 364. 1 Sal. 255.

So, *de messuagio sive tenemento et 4 acris terræ eidem spectan.* is sufficient for the four acres; for *eidem spectan.* shall be rejected. R. 3 Leo. 228.

*De messuagio sive burgagio in H.* for they are synonymous in a borough. R. Hard. 173.

*De messuagio sive tenemento vocat.* the Black Swan. 3 Mod. 238. 1 Sid. 295.

So, it shall be aided, if the verdict finds the defendant not guilty, for a part which is uncertain. 1 Sid. 295.

Or, if the plaintiff releases as to that. 1 Sid. 295. Hard. 58.

Ejectment lies in C. B. for land in Wales. Barnes, 181.

The court will not consolidate declarations in ejectment against different persons though the title be the same in all. -Str. 1149.

But, if there are several ejectments against different persons, and all the ejectments for the same premises, they shall be consolidated. Barnes, 176.

< So, ejectment will lie for an interest reserved in lands, provided, it be such as that possession of it may be delivered: Thus where the grantor reserved to himself, his heirs and assigns forever, the right of erecting a mill dam at a certain place, and to occupy and possess the premises, &c. ejectment will lie. Jackson v. Buel, 9 Johns. Rep. 298.

It seems, that the plaintiff cannot declare for a whole tract of land, and give evidence of an undivided moiety. Young v. Drew, 1 Tay. 119.

The plaintiff may declare for a moiety, and recover a third of a tract of land. Squires v. Riggs, 2 Hayw. 150.

So, he may declare for a ninth and recover an eighteenth. Den v. Evans, 2 Hayw. 222. >

[\*419]

(2 Z 2.) Must be upon a good demise.

So, the declaration in ejectment must shew a good demise ; and therefore, if he declares upon a demise of 10 *acr. terræ et 20 acr. prati per nomen 10 acr. prati plus vel minus*, it is bad. R. Yel. 166.

On a demise of tithes, without saying, by deed. R. 2 Cro. 613.

Upon a demise by A. and Ann his wife, where she was named Agnes. R. Cro. El. 776.

Upon a demise of the fourth part of a messuage, by virtue whereof he entered into *tenementa prædict.* Cont. Cro. El. 286, for it shall be restrained to so much as was demised.

Upon separate demises by joint tenants, the entire premises may be recovered. 12 East, 57.

< So tenants in common may declare either on a joint or separate demise. Jackson v. Bradt, 2 Caines' Rep. 169. Vide Doe v. Potts, 1 Hawks, 469.

So, a coparcener may bring ejectment on her separate demise. Jackson v. Sample, 1 Johns. Cas. 231.

So, separate demises of several lessors, may be laid in the declaration ; and the plaintiff may give evidence of the separate titles, and recover according to the proof. Jackson v. Sidney, 12 Johns. Rep. 185.

But the plaintiff cannot recover under a demise of a lessor, who has released his interest to the defendant, because he is estopped. Jackson v. Foster, 12 Johns. Rep. 488. Vide Robinson v. Campbell, 3 Wheat. 212. Campbell v. Les. of Gratz, 6 Binn. 115. >

So, if the declaration does not shew the vill where the land demised lies, except in the *per nomen*, &c. R. Cro. El. 822.

But the vill in which the demised lands lie, though omitted in the declaration, shall, after verdict for the plaintiff, be collected from the vill in which the ejection is laid to have been committed. 2 Bl. 706.

But a declaration of Hilary term, upon a demise within the same term, is good. 1 Vent. 135.

[\*]Or, upon a demise, 30 Feb. *habendum a die dat.* (which is impossible,) for the lease commences immediately. 1 Vent. 137.

Or, upon a demise *per scriptum obligator. habendum a die dat. indenturæ prædict.* Ibid.

Or, upon a demise 20 Feb. *habendum a die dat.*, for it shall be intended to commence upon the day of the demise. R. 2 Cro. 646.

Or, *habendum* from Michaelmas *ante dat.* R. Cro. El. 606.

Or, *habendum a confectiione*, without saying when it was delivered. R. Cro. El. 773.

In the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had ; and the lessee of such an administrator may declare in an ejectment on a term for seven years ; for the time is not conclusive. 3 T. R. 13.

Demise from heir by descent laid on the day of the death of the ancestor to hold from the day before, is good after verdict. 3 Wils. 274.

So, upon a demise by a college or ecclesiastical person, without shewing that there was a rent reserved, &c. pursuant to the st. 13 El. R. Sav. 129.

If the declaration alleges a demise, *virtute cujus* defendant *fuit possessionat. et postea eject.*, it is good, though the entry or ejectment is alleged at a day precedent, blank, or impossible. R. 2 Cro. 96. 154. 312. 662. 2 Bul. 29. Dub. 1 Sid. 8. Cont. Cro. El. 766. R. cont. 3 Mod. 198.

The day on which the demise is stated to have been made must be subsequent to the time when the claimant's right of entry accrues. 4 T. R. 680. < Vide Van Alen v. Rogers, 1 Johns. Cas. 281. >



When an ejectment is brought against a tenant at will, the demise must be laid subsequently to the determination of the will. 4 T. R. 680.

In ejectment on the demise of an heir by descent, the demise was laid on the day his ancestor died, and held well enough after a verdict. 3 Wils. 274.

When a fine with proclamation has been levied, and an actual entry is necessary to avoid it, the demise must be laid on a day subsequent to the entry. 13 East, 489.

Where an entry has been made to avoid a fine, the party so avoiding the fine cannot lay his demise in ejectment, or recover the profits that accrued, before such entry. 7 T. R. 727.

The court will, on consent, but not without, give leave to enlarge the time of the demise. B. R. H. 165.

The time was enlarged, being so laid that it had expired twelve years before the action brought, on payment of costs; though a special jury had been struck, and the parties had gone down to the assizes, before the mistake was discovered. 2 Bl. 940. 2 Str. 272. 4 Burr. 2447. Cowp. 841.

So, misprision in the demise may be amended, if the declaration delivered was good. Vide Abatement, (L 2.)

There can be no alteration in the declaration in the issue, from the first declaration delivered, only in the defendant's name. 2 Ld. Raym. 1411.

The surrenderee of copyhold lands may recover against the surrenderer on a demise laid between the time of surrender and admittance, because the title relates back from the time of the admittance to the surrender against all persons but the lord. 1 T. R. 600.

So, a surrender of chambers in New Inn to the treasurer and ancients of the society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser before admission; [\*]and therefore, on the death of the surrenderee before admission, the society may maintain ejectment for them. Ibid. 393.

### (2 Z 2. a.) Must shew a sufficient *ouster*.

In ejectment for several tenements upon several demises, a charge that the defendant entered into the tenements aforesaid, is sufficient. Ld. Raym. 561.

And will not be vitiated by the addition of an averment that the plaintiff's term aforesaid therein was not then finished. R. Ld. R. 561.

### (2 Z 2. b.) Notice to quit, entry, or demand of possession.

A notice at the bottom of a declaration in ejectment, affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant generally, was held insufficient. 1 Moore, 113.

If the notice subjoined to the declaration in ejectment be subscribed with the name of the nominal plaintiff, instead of the casual ejector; the court will not, therefore, set aside the proceedings. 3 T. R. 351.

Where the lands were situated in Devonshire, and the notice was to the tenant to appear in Michaelmas term, when, according to the practice in country causes at that time, it should have been to appear in an issuable term, and the affidavit stated, that if the lessor were not permitted to amend, he would be barred by the statute of limitations from bringing a new ejectment; the court permitted the lessor to amend upon payment of costs. 7 T. R. 469.

In a country ejectment, the notice may be to appear of the next issuable term, and judgment may be moved for in that term. 4 Taunt. 738.

Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it on giving a parol notice. Willes, 43.

Service upon one of two tenants in common, &c. is good service upon both. 1 B. & P. 369. But see Loft. 301., that service must be upon both where they are living separately; *sed quare* this case in Loft.

Tenant in possession personated at the time of service by another who accepted the service in her name ; good service upon the tenant herself. 2 Burr. 1181.

Service of declaration in ejectment in the name of the tenant, on a person representing himself to be in possession for another, than absent *pro tempore*, and who afterwards acknowledges an appraisal of the service, is sufficient to obtain judgment against the casual ejector. But it should appear clearly from the affidavit, that the person who was the object of such service, was tenant in possession. 1 Price, 339.

Service of a declaration in ejectment on a wife, upon the premises, or at the husband's house elsewhere, is good service. 6 T. R. 765.

When the declaration is explained to, and left with the wife upon the premises, or at the husband's house elsewhere, it will be good service. 2 B. & P. 55. Blk. 800. 6 T. R. 765.

It seems that service on the wife will be good any where, if it be sworn that she and her husband were then living together as man and wife. 1 N. R. 308.

The mere acknowledgment of the wife, that she has received a declaration in ejectment and given it to her husband, if it be not personally served upon the wife, will not be good notice. 1 B. & P. 384.

Service on the daughter upon the premises, in the absence of the tenant and his wife, and subsequent acknowledgment, by the tenant of having received [\*]it, is insufficient, unless the receipt appeared to have been before the essoin day. 14 East, 441.

Where the service was upon the daughter, and on a subsequent day the wife acknowledged that she had received the declaration, and shewed it to the attorney, who then read it over to her and explained it, upon which the wife said, that the paper should be sent to her husband ; the service was held sufficient. 1 H. B. 644.

Service upon a person appointed by the Court of Chancery to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, was held insufficient. 1 B. & P. 385.

After several ineffectual attempts made to serve a tenant in possession, with a declaration in ejectment, on occasion of the last of which, his servant admits that he is in the house, but refuses to permit the person applying to see him ; if the declaration be then delivered to the servant, the court will make an order that such service shall be sufficient. 2 Price, 112.

In the case of lunacy, the notice must be served on the committee. Lofft. 401.

Nailing the declaration on the barn door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house on the premises, and the tenant not to be found at his last place of abode, was held sufficient service. 1 N. R. 293. ; and see Lofft. 266. 273.

Service of declaration at the house, may be made good by a subsequent rule of court. 1 Blk. 290.

Rule, that service at the house of tenant in possession on a day past, be good service ; and also service of rule at house of said tenant. 1 Blk. 317.

¶ A tenant who may be considered as holding from year to year, is entitled to notice to quit. Vide Jackson v. Bryan, 1 Johns. Rep. 322. Jackson v. Wilsey, 9 Johns. Rep. 267.

So, where the defendant enters into possession under an agreement to purchase the land, and does not fulfil his contract, he must have notice. Jackson v. Rowan, 9 Johns. Rep. 330. Jackson v. Niven, 10 Johns. Rep. 335.

So, a mortgagor in possession, is entitled to notice. Jackson v. Laughead, 2 Johns. Rep. 75. Jackson v. Green, 4 Johns. Rep. 186. Jackson v. Hopkins, 18 Johns. Rep. 487.

But a purchaser from the mortgagor, is not entitled to notice. Jackson v. Chase, 2 Johns. Rep. 84. Jackson v. Fuller, 4 Johns. Rep. 215.

It is otherwise, if the mortgagee assign his interest, because the privity of estate is not thereby destroyed, nor the condition of the tenancy changed. Jackson v. Hopkins, 18 Johns. Rep. 487.

Notice to the immediate lessee, is sufficient, though another is in possession Jackson v. Baker, 10 Johns. Rep. 270.

In all cases where the tenant may be considered as a tenant at sufferance or at will, he is not entitled to notice. *Jackson v. Parkhurst*, 5 Johns. Rep. 128. *Jackson v. Bradt*, 2 Caines' Rep. 169. *Jackson v. M'Leod*, 12 Johns. Rep. 182.

In order to entitle the tenant to notice, there must be a privity either of contract, or estate, by which, the relation of landlord may subsist. *Jackson v. Fuller*, 4 Johns. Rep. 215. *Jackson v. Deyo*, 3 Johns. Rep. 422. *Jackson v. Rogers*, 1 Johns. Cas. 33. S. C. 2 Caines' Cas. in Error 314. *Jackson v. Kingsley*, 17 Johns. Rep. 158.

So, a person claiming under an adverse title, is not entitled to notice, for the reason that there is no tenancy. *Jackson v. Cuerden*, 2 Johns. Cas. 353. *Jackson v. Aldrich*, 13 Johns. Rep. 106.

A mere servant or bailiff is not entitled to notice. 1 Johns. Cas. 231.

A disclaimer by the tenant, is a waiver of notice. *Jackson v. Wheeler*, 6 Johns. Rep. 272.

And notice of sale of mortgaged premises, given for six months, successively, shall be deemed equivalent to six months notice to quit. *Jackson v. Lamson*, 17 Johns. Rep. 300. >

If a tenant for life levy a fine with proclamations, an actual entry is necessary by the remainder-man or reversioner, before he can maintain ejectment. 7 T. R. 433. 727.

If a tenant for life levy a fine with proclamations, an actual entry is necessary by the remainder-man or reversioner, before he can maintain ejectment. And such entry may be made, either within five years next after the time of the levying of the fine, by reason of the forfeiture, or within five years next after the natural determination of the preceding estate. 8 East, 552. 1 Taunt. 578.

If all the proclamations have not been completed, the fine will only enure as a fine at common law, and no entry will be necessary to avoid it. 9 East, 17. Willes, 177.

If a tenant for years levies a fine, without previously acquiring an estate of freehold, by a feoffment, the landlord may maintain ejectment at the end of the term, without an entry to avoid the fine. 1 East, 568.

If a tenant for life forfeits his estate by suffering a recovery, the remainder-man may maintain ejectment without an actual entry. 1 T. R. 738.

Entering into the common rule does not dispense with a previous demand of possession when necessary. 13 East, 210.

Ejectment does not lie against one let into possession under a contract of purchase, without a previous demand of possession. 13 East, 210.

Where a person enters under an agreement for a lease, without a stipulation, that in case a lease is not executed he shall hold for one year certain, if a lease be tendered to the occupier, which he refuses to execute, he may be ejected without any notice to quit. 2 Taunt. 149.

### (2 Z 3.) Plea.

Leave may be given to plead to the jurisdiction in ejectment, before judgment nisi against the casual ejector. 1 Bl. 197.

The new defendant in ejectment may give a rule to reply, and *non pros.* the plaintiff; but can have no costs unless the lessor of the plaintiff has joined in the rule by consent. 2 Bl. 763.

[\*] When a declaration is delivered to the tenant in possession, the course now is, that he who claims title must procure himself to be admitted as a defendant, and enter into the general rule, whereby he agrees to appear and receive a declaration, and plead not guilty, and at the trial to confess, lease, entry, and ouster.

By the st. 4 Geo. 2. 28. the court may give leave to the landlord to defend with the tenant in possession, if he appears, or if not, to defend alone.

The court will not permit a lessee alone to defend an ejectment against his land-

[\*423]

lord or those claiming under him, on a supposed defect of the landlord's title. 2 Bl. 1259.

Nor, shall a man defend himself in it, by an estate which makes part of the title of the lessor of the plaintiff. Cowp. 46.

A tenant enters into possession under an agreement for a term of years, pays rent to the party demising, and afterwards disclaims. The landlord, the term having expired, brings in ejectment against the tenant, who neglects to appear, but a third person claiming to defend as landlady, appears and defends in his room. Held, that she could not set up her own title in defence of this ejectment; for since the tenant could not dispute the plaintiff's title, neither could one claiming as his landlord, and in privity to him, do so. And that the plaintiff need not to move to discharge the rule for the appearance, but might object to the defence at the trial. 4 M. & S. 347.

Where a landlord defrays the cost of defending an ejectment, in the name of an illiterate tenant, who gives a *retraxit* of the plea and *cognovit* of the action; the court will set aside the *retraxit* and *cognovit*, and permit the lessor to defend as landlord. 7 Taunt. 9.

The motion to admit the landlord to be defendant instead of the tenant, ought regularly to be made before judgment is signed against the casual elector by the opposite party; and if it be delayed until after that time, it will be granted or not by the court, at their discretion. 4 Burr. 1996.

Neither a tenant in common, nor any other, can be admitted a defendant in ejectment, without confessing lease, entry, and ouster. 1 Anst. 86.

Where an ejectment is brought by a joint tenant, parcener, or tenant in common, against his companion (to support which an actual *ouster* is necessary) the court will grant the defendant a special rule, requiring him to confess lease and entry at the trial, but not *ouster* also, unless an actual *ouster* be proved. 2 Taunt. 397.

Where the lessor made an actual entry in September 1744, and the demise was laid in October 1744, and the defendant levied a fine 1745, it was held that the lessor had no occasion to make another entry. 1 Wils. 199.

Service of ejectment at the house may be made good by a subsequent rule of court. 1 Bl. 290. 317.

If servants refuse to call their master, or to take declaration, the court will order leaving it at the house to be good service. Str. 575.

If copy of declaration is tendered to wife of tenant in possession, in the shop, the notice to appear is offered to be read; but she goes away, and declaration is left in the shop, the court will grant rule to shew cause why not good service: so, if tenant keeps out of the way to avoid being served. 2 Wils. 263.

If declaration is tendered (through a window,) and refused and violence threatened, it is sufficient to leave declaration. Barnes, 174.

Or, if tendered, and on non-acceptance left on the floor, and the subscription read, so that the tenant who had retired might hear, it is good. Barnes, 185.

And where tenants abscond, court will order service on a servant to be good. Barnes, 188, 189, 190.

Or, if lunatic, on the person who has the custody. Barnes, 190.

[\*]So, if declaration is delivered to a daughter or a father, and owned by tenant, it is good. Barnes, 175, 176. 183.

Service of a declaration before the essein-day of the term on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good, provided it appears that the daughter delivered it to the wife, though it should not appear that such delivery was before the essein-day. 1 H. Bl. 644.

If tenant absconds, declaration delivered to servant, and another fixed on door, is good. Barnes, 173.

Service on churchwardens and overseers, for a house they rented for lodging the poor, good. Barnes, 181.

On the wife of tenant, as she informed deponent, and he believes, good. Barnes. 194. Vide 2 Bl. 800.

Notice to appear given in beginning (though not first day) of Michaelmas term in London, good. Barnes, 175.

The notice must be to appear on the first day in full term, not on the essoin-day. Str. 1049.

Appearance must be entered with filazer, and marked on common rule. Barnes, 177.

Though declaration and subscription is read to wife through a window, and then fixed to the door, and husband owns the receipt, it is not good service. Barnes, 171.

Affidavit of service on wives of A. and B., who, or one of them, are tenants, bad. Barnes, 174.

So, on A. B. tenant, or C. his wife. Barnes, 173.

A declaration in ejectment may be served on the wife, either on the premises or at the husband's house. 6 T. R. 765.

Service of a declaration on one of two tenants in possession, is good service on both. 1 Bos. & Pull. 369. Quære, 1 H. Bl. 644.

The mere acknowledgment of the wife of the tenant in possession, that she has received a declaration in ejectment, is insufficient to bind the husband. Ibid. 384.

Service of a declaration on a person appointed by the Court of Chancery to manage an estate for an infant, is insufficient. Ibid. 385.

If the plaintiff in ejectment, or in an action for the mesne profits, afterwards releases, he may be committed for a contempt: for he is only nominal. 1 Sal. 260.

By the st. 4 Geo. 2. 28. if no tenant in possession, the declaration may be fixed on the door of the house; or, if no house, on some notorious part of the land.

This act seems to relate only to ejectments for non-payment of rent, where the landlord has a right to re-enter.

Ejectment on vacant possession in London or Middlesex may be moved any time in term. Barnes, 172.

Landlord is not made defendant in cases of vacant possession, (except within the act concerning landlords and tenants by lease, with clause of re-entry,) but he that first seals lease on premises must have possession. Barnes, 177.

Tenants are not obliged to appear, though indemnified. Barnes, 173.

If tenant in possession refuse to appear and make defence, there is no relief. Str. 830.

N. B. This was before, and was the occasion of the st. 11 G. 2. c. 19. by which, if tenant does not appear, judgment against casual ejector, but landlord may have leave to appear and enter into common rule, and execution shall be staid till further order.

If landlord obtains a rule to be made defendant, the plaintiff at trial must prove that defendant or his tenant was in possession. 1 Wils. 220.

He who claims title must be a defendant with the tenant in possession. Per C. B. M. 7 An.

[\*]Or, he may appear alone by order of the court, or by consent of the attorney for the plaintiff.

The court (of B. R.) will not order the landlord to be made defendant in the room of the tenant in possession, on an affidavit that he is a material witness. Str. 632.

One claiming as lord by escheat may be admitted defendant in an ejectment brought against the tenant in possession by the lessor of one claiming as heir at law. 3 Burr. 1290. 1 Blk. 357.

A remainder-man claiming under the person last seised, will be admitted to defend, though he has never been in possession. 3 T. R. 783.

A mortgagee was permitted to defend an ejectment with the mortgagor. 5 T. R. 645.

[\*425]



A cestuy que trust who has never been in possession, will not be admitted to defend. 3 T. R. 783.

A devisee in trust, not having been in possession, was permitted to defend an ejectment. 4 T. R. 122.

The immediate heir to the person last seised will be admitted to defend, though he has never been in possession. 3 T. R. 783.

Landlord is not to be made defendant without tenant in possession, though he refuses to appear, only joined. Barnes, 172.

So, if tenant has quitted possession. Barnes, 175.

So, he who claims title shall be joined as defendant, though the plaintiff opposes it, and he is entitled to privilege. 1 Sal. 256.

Though she is wife to the lessor. 1 Sal. 257.

But he shall not be joined upon the plaintiff's motion, without his request. 1 Sal. 256.

Nor, shall he be made a plaintiff by rule who is entitled to privilege. Qu. 1 Sal. 256.

The court will order an infant lessor of the plaintiff to name a good plaintiff, to be answerable for costs. Str. 694. Str. 932. B. R. H. 56.

But not a lessor having privilege of parliament. Str. 479.

If the guardian undertake for costs, it is sufficient. Cowp. 128.

So, the defendant may pray a special rule to defend for so much.

If it be a church, in which he ought to perform divine service, he may have a special rule to defend for that. 1 Sal. 256.

In ejectment for a chapel, the parson cannot defend only for a right to enter and perform divine service, notwithstanding. Salk. 256. Str. 914.

A doubtful equity cannot be set up in ejectment, as a defence of the title of the heir at law. 2 T. R. 684.

A. by an agreement in writing, but not stamped, articles with B. to grant him a lease for twenty-one years, B. enters and continues in possession eighteen years; but no lease was ever tendered by A. or demanded by B. The agreement is a defence to an ejectment by A. Cowp. 473.

In ejectment, which is a fictitious action to recover the possession, the lessor of the plaintiff shall not be permitted to defeat a solemn deed under his own hand, covenanting, that the defendant shall enjoy the premises, and also for further assurance. Cowp. 597.

An ejectment cannot be maintained contrary to the lessor's own covenant. 4 Burr. 2209.

So, there may be a rule to amend the declaration and plead in a special manner, to bring the merits of the case in question. Carth. 180.

Defendant need not plead the statute of limitations, for plaintiff must shew a right of possession as well as of property. 1 B. M. 60. 4 Burr. 1963.

Though defendant confesses lease, &c. he may afterwards move to set aside verdict for variance. Barnes, 175.

[\*]If an affidavit, on which a motion is originally made, is entitled in the name of the casual ejector, and the rule to shew cause, &c. is in the name of the tenant in possession, it is wrong, and the rule shall be discharged; for it appears to be a different cause, and a rule in one cause cannot be supported by an affidavit in another. Andr. 368.

When the party appearing, has entered into the consent rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the consent rule, and the plaintiff may be non-prossed thereby; but as the plaintiff is only a fictitious person, the defendant will not be entitled to costs. 2 Blk. 763.

When the lessor claims as heir, and proves his pedigree, and stops, and the defendant sets up a new case, which is answered by fresh evidence on the part of the lessor, the defendant is entitled to the general reply. 4 T. R. 497.

Evidence must in all cases be given of the possession of the defendant, or such

of his under-tenants as have declarations served upon them at the time of the commencement of the action. 7 T. R. 327. 1 B. & P. 573.

Where an ejectment is brought by a landlord against the tenant, proof of title will not be required, since a tenant is not permitted to controvert the title of the person under whom he came into possession. And this principle is extended to the under-tenants of the original lessee, as well as to the lessee himself; so that if B. claiming under A. lets the lands to C., and A. afterwards brings an ejectment against C., C. cannot dispute A.'s title. 7 T. R. 488.

On the determination of a tenancy for a determinate period, the landlord has only to prove the counterpart of the lease by the subscribing witness, when the demise is by deed. 7 East, 362.

If parol evidence should be offered to prove a tenancy; it is no objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the landlord and tenant, and that it continued in force to the very time to which the parol evidence applies. 12 East, 237. Id. 239.

< The signing of the consent rule, delivering a new declaration, putting in common bail and filing the plea, are simultaneous acts. Jackson v. Woodward, 2 Johns. Cas. 110. S. C. Coleman, 120. >

### (2 Z 4.) Judgment.

If the defendant does not appear within four days after the beginning of the term, after the declaration delivered, (if the action is in London or Middlesex,) upon an affidavit of the delivery of the declaration to the tenant himself or his wife, before the essoin-day of the same term, with notice to appear at the beginning of the term, there shall be judgment against the casual ejector named in declaration, and thereupon an *habere facias possessionem*, to put the plaintiff in possession.

Or, upon delivery to the servant, if by letter or otherwise the tenant in possession afterwards acknowledges notice thereof. 1 Sal. 255.

Declaration must be delivered before the essoin-day of the term, or no judgment till next term. Barnes, 172.

Declaration of Trinity, with notice to appear next Hilary, appearance of Michaelmas is bad. Barnes, 250.

The affidavit of one who saw the declaration served upon, and heard it explained to the tenant in possession, is sufficient. 2 B. & P. 120.

Semble, that in K. B. the affidavit must state, that the declaration was delivered to the tenant before the essoin-day; that the declaration was received by the wife prior to the essoin-day, and the like. 14 East, 441. But in C. B. where service is upon the wife, it need not appear from the affidavit, that the declaration came to her hands before the essoin-day. 1 H. B. 644.

[\*] If the plaintiff has judgment for the whole, when he had title only to a moiety, it is no error. Dub. Cro. Car. 7.

So, if the defendant does not appear within a week after the term, when the action lies in another county, and an affidavit is made of the delivery of the declaration before the essoin-day of Hilary or Trinity term, with notice to appear the next term.

If the declaration be delivered in such county, before the essoin-day of Michaelmas or Easter term, with notice to appear the next term, upon such affidavit, there shall be a rule for the defendant to appear in Hilary or Trinity term; and if upon service of the rule he does not appear accordingly, there shall be judgment against the casual ejector.

Where the possession was divided amongst several, and in the several declarations served, the name of the individual tenant alone, to whom any particular declaration was delivered, was prefixed to the notice to such declaration, instead of the names of all the tenants, so that the person making the affidavit of service, could not

swear that a copy of any one declaration and notice had been served on all the tenants, the court, notwithstanding, thought one rule sufficient on motion for judgment against the casual ejector. 7 T. R. 477.

Rule touching the rule for judgment in ejectment. 4 T. R. 1.

Rule of C. B. relative to the entry of rules for judgment in ejectment. 1 Taunt. 317.

Rule touching the entry of rules in ejectment. 4 T. R. 1.

Rule of C. B. relative to the book of entry of rules in ejectment. 1 Taunt. 317.

But after judgment signed, a judge, before the assizes, if possession is not taken, may direct the plaintiff to accept a plea. Sal. 516.

Judgment against the casual ejector, though regular, will be set aside even after execution executed, upon affidavit of merits, or other circumstances. 4 Burr. 1996.

A judgment and execution will not be set aside to let in the owner to defend who had notice of the ejectment, but concluded from the plaintiff's former conduct, that it would not be proceeded in. 3 Taunt. 506.

Writ of possession executed, set aside on circumstances, and the mesne landlord let in to try. 5 Taunt. 205.

After judgment, every possible intendment will be made in favour of the plaintiff, and if the title declared on can by any means be supposed to exist consistently with the judgment, such judgment will be supported. 2 N. R. 1.

If rent be tendered before the delivery of the declaration in ejectment, the court will, on motion, set aside the proceedings, with costs. 2 Blk. 746.

Where mortgaged premises are recovered from the tenant, the mortgagee is entitled to relief under st. 4 Geo. 2. c. 28. s. 2. 3 Taunt. 402.

Where the ejectment is undefended, and against the mortgagor himself, the court have no jurisdiction under 7 Geo. 2. c. 20. *Secus*, where against his tenant. 4 Taunt. 887.

On setting aside an ejectment, upon payment of arrears, they are to be computed only up to the last rent-day. 4 Taunt. 883.

If the term expires *pendente lite*, yet the plaintiff may recover damages, though not the term. (Vide 2 Str. 1056.)

And the term shall not be enlarged without consent, though the plaintiff was delayed by injunction. 1 Sal. 257. Mod Ca. 130. Carth. 3. [Vide *supra*.]

If the declaration be delivered of a house or land void of a possessor, there must be a lease executed upon the land, &c. and before [\*] judgment, there shall be an affidavit of the lease, entry, &c. and a rule upon motion for a peremptory plea. R. 1 Sal. 255.

There shall be a rule for judgment, on affidavit of the messuage being empty and door shut, of lessor entering by standing in the threshold, and taking hold of the knocker, lease, entry, *ouster* and delivery of ejectment. B. R. H. 112.

Leaving beer in an alehouse-cellar, is keeping possession; and if judgment is signed on a lease sealed, as on a vacant possession, it shall be set aside. Str. 1064.

But motion for judgment against the casual ejector in London or Middlesex will not be allowed, if it is not made within a week after the first day of Michaelmas or Easter term, or within four days after the first day of Hilary or Trinity term. Per Rule, Tr. 32 Car. 2. Mills. 80.

The clerk of the rules of the court of B. R. shall for the future keep a book, in which shall be entered all the rules which from time to time shall be delivered out in ejectments, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff, (with the words "and others," if there be more than one,) and also the name of the casual ejector. 4 T. R. 1.

Unless the rule for judgment shall be drawn up and taken away from the office

the clerk of the rules within two days after the end of the term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment. *Ibid.*

Or, there is not a new notice given to the tenant in possession. 1 *Sal.* 257.

Where the plaintiff is nonsuited for want of the defendant's confessing lease, entry, and *ouster*, he is not entitled to sign judgment against the casual ejector till the *postea* comes in on the day in bank. 2 *T. R.* 779. *Vide Lilly's Pr. Reg. tit. Postea.* 1 *Salk.* 259.

Casual ejector cannot confess judgment. *Str.* 531.

If judgment is obtained upon service of A. who counterfeits himself tenant in possession, there shall be restitution. *Mod. Ca.* 73.

A landlord from whom the ejectment was concealed, will not be let in to defend after a recovery, without collusion, and sale and transfer of part. 4 *Taunt.* 820.

If judgment is set aside, and possession ordered to be restored, but lessor of plaintiff absconds, so the rule ineffectual, a writ of restitution shall issue. *Barnes,* 178.

So, if the plaintiff was nonsuited, or had a verdict against him in a former ejectment for the same tenements, he shall be restrained from proceeding upon motion till he pays the costs of the former action. 4 *Mod.* 379.

Whether a second ejectment, brought before the costs of a prior ejectment have been paid, is brought upon the demise of the same, or different persons, against all or some of the same parties, or with others, or for the same or different premises; if brought to try the same title to part of the same estate, proceedings will be stayed. 6 *T. R.* 740.

Proceedings in a second ejectment will be stayed till the costs of a former one have been paid, although the lessor of the plaintiff in the second ejectment were the defendant in the first. 6 *T. R.* 223. 3 *B. & P.* 22.

Proceedings in a second ejectment were stayed until the costs of a prior ejectment were paid, in a case where the second action was between the [\*] heir of the plaintiff's lessor, and the heir of the defendant in the first action. 8 *T. R.* 645.

The courts will stay proceedings in a second ejectment until the costs of a former one be paid, if the conduct of the party against whom the application is made, has been vexatious or oppressive, although he may not be liable to the costs of the first action. 2 *Blk.* 904.

An ejectment brought by the fraudulent assignee of an insolvent debtor was stayed till the costs of former ejectments, which had been brought by the debtor himself, were paid. 2 *Blk.* 1180.

The proceedings in a second ejectment were stayed until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error), as well as the costs of the first ejectment, were paid. 4 *East,* 585. ; though the first ejectment was in another court. 15 *East,* 233. But the damages in the action for mesne profits will not be included. *Ibid.*

Proceedings in ejectment may be stayed the day before trial, till the costs of a former ejectment are paid. 2 *Blk.* 1159.

The form of an application pending a second ejectment, to enforce payment of the costs of the first, should be, that the proceedings may be stayed not until security for the costs has been given, but until they are paid; and the affidavit in support of it should state, that they are unpaid. 1 *T. R.* 491.

If plaintiff had rule for trial at bar, but it being on wrong demise, delivers new ejectment, the court will not grant new trial at bar, but on payment of costs of the former ejectment. *Str.* 548.

Plaintiff shall not proceed in new ejectment till he has paid costs of the first, though he has brought writ of error. *Str.* 554.

Although in such former ejectment the lessor of the plaintiff never entered into the consent rule. 2 Bl. 904. 1158. 1180.

If there is judgment for defendants in ejectment on the demise of husband and wife, (the remainder being in the wife, who proceeds after her husband's death,) because tenant for life, though a papist educated abroad, may conform; and on his death, wife brings new ejectments against some of the former defendants and others; the court will stay proceedings in the new till the costs of the old are paid. Str. 1152.

If the first ejectment was in C. B., and there was a rule there to stay him in a second till costs paid, there shall be the same rule in B. R. if he afterwards sues there. 1 Sal. 255.

But the defendant in a former ejectment shall not be restrained, if the verdict was against him till he pays the costs; for though he was barred before, the new ejectment by him is not vexatious. R. 4 Mod. 379.

So, if the defendant brings error, and afterwards delivers a declaration in ejectment, he shall not be bound to pay the costs upon the first ejectment. 1 Sal. 259.

Yet the court will stay all proceedings on the second ejectment, till error determined. 1 Sal. 258.

If a mortgagee brings ejectment, the court will order him to shew cause why, on payment or bringing into court principal, interest, and costs, proceedings should not be stayed. Str. 413.

On the application of the mortgagor, or his assignee of the equity of redemption, the court will stay proceedings in ejectment on payment of principal, interest, and costs, without paying money due on a bond; but not if it was an heir. Str. 1107. And. 341.

If mortgagee has given notice that he requires a bond, (a lien on the estate,) to be paid, as well as mortgage, there cannot be a rule to stay proceedings [\*] on payment of principal, interest, and costs, on mortgage only. Barnes, 177.

But this extends not to bond due to an assignee in his own right. Barnes, 182.

On payment of principal, interests, and costs, the court will stop proceedings in ejectment on a mortgage, and on the bond for performance of covenants; and will discharge defendant out of custody, though he had agreed to convey equity of redemption to plaintiff, if plaintiff has not tendered him a conveyance to be executed. Wils. 80.

The court will not stay the proceedings on the mortgagor paying principal, interest, and costs, if he has agreed to convey the equity of redemption to the mortgagee. 7 T. R. 185.

Where a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings, on payment of what is due, and costs; if the mortgagee gives notice of other demands, as cause against the order, he must specify the nature and amount of such demands. 3 Anst. 987.

The time for the application of the tenant to stay proceedings, under 4 Geo. 3. c. 28. is limited to the time anterior to the trial. 7 East, 362.

After judgment on re-entry for non-payment of rent, and before writ of possession executed, the court will stay proceedings, on payment of rent and costs. Str. 900.

On staying proceedings on payment of arrears of rent and costs, the landlord shall only allow land-tax for the rent, and not what was paid more on account of improvements. Str. 1191. Wils. 21.

On staying proceedings, on payment of money due, the prothonotary will make just allowances. Barnes, 176.

Rent due to lessor of plaintiff as devisee, more due to him as executor, proceedings stayed on paying what was due to him as devisee. Barnes, 184.

In ejectment on two demises of different lands, judgment to recover *terminum suum*, in the singular, is good. Str. 835



If there are two counts in the declaration on two demises of different persons of the same premises, and judgment is entered for plaintiff on one count, and for defendant on the other; the court, on error, will interpret the *tenementa prædicta* as to the second, to mean the term in the premises, and it will be well. Str. 908.

Or, if the judgment is that plaintiff recover his terms (in the plural) on two demises of the same premises for the same term, both as to commencement and duration; on error brought, the court, in order to support the judgment, will intend that the two lessors were joint-tenants, and made separate leases. Str. 1180. 1 Wils. 1.

If judgment is regularly signed, but without loss of trial, it may be set aside, on payment of costs and taking notice of trial. In B. R. as in C. B. Str. 975.

The court cannot stay proceedings after special verdict in ejectment, though the lessor of plaintiff's title is at an end; for he may proceed for damages and costs. Str. 1056.

Not every person claiming title is landlord within 11 G. 2. but one who is in some degree of possession; as, by receiving rent, &c. Barnes, 193.

If landlord (by virtue of stat. 11 G. 2. c. 19.) appears alone, and after judgment for plaintiff brings error, plaintiff cannot have execution till error determined. Str. 1241.

If the landlord on tenant's not appearing makes himself defendant, and plaintiff obtains judgment against him, and moves for leave to take out execution against casual ejector, and defendant, who has regularly sued out error before this, does not shew it for cause against the rule for execution, which is made absolute, and possession delivered, this shall not be afterwards set aside as irregular. 2 B. M. 756.

[\*] If landlord is added defendant to one tenant, who appears for part, and defends alone for other part where tenant refuses to appear, plaintiff shall have judgment for this last part against casual ejector, with stay of execution. Barnes, 179.

If some defendants confess lease, &c. and there is verdict against them, and others do not confess, and are acquitted, plaintiff shall have judgment against casual ejector. Barnes, 174.

If landlord made defendant does not appear to confess, &c. execution shall be against the casual ejector. Barnes, 182. 185, 186.

The court will not give leave to take out execution on judgment against casual ejector, after verdict for plaintiff, pending error brought by defendant. Barnes, 208.

For non-payment after issue, it may be signed against defendant, but not against casual ejector. Barnes, 253.

If lessor of plaintiff dies after issue joined, and before the assizes, and plaintiff is nonsuited because defendant does not confess lease, &c., executor of lessor shall not have costs taxed on the common consent-rule. 2 Wils. 7.

If in ejectment against two, one dies after issue, but before trial, the death must be suggested on the plea-roll, but need not on the *nisi prius* roll; it must be awarded, that proceedings stay against the deceased, but no need of *quod quer nil capiat*; and judgment must be, not for a moiety, but that plaintiff recover his term; but he must take execution for no more than he has a right to recover. 1 B. M. 362.

A judgment in ejectment is a recovery of the possession without prejudice to the right; and he who enters under it can only be possessed according to right; and he who recovers a naked possession only, without right, can convey no other to his feoffee. 1 B. M. 60.

Possession under a judgment in ejectment, enures according to the right of the party recovering, and no more. Cowp. 689.

On a special verdict it ought to appear that lessor of plaintiff might enter at the time he brought the ejectment. Ibid.

A lease under a power made unfairly, and in prejudice of those in remainder, found in the custody of the maker at his death, ought, at the trial, to be presumed to have been surrendered, to let in the statute of limitations. Ibid. Vide Pojar.

One who recovers land, part of a highway, must recover it subject to the easement, and the sheriff must deliver possession subject to it. 1 B. M. 133.

The nominal plaintiff and casual ejector are to be considered as the fictitious form [\*431]

of an action really brought by the lessor of the plaintiff against the tenant in possession, who are substantially the only parties to the suit.

But the plaintiff in ejectment is, so far as the action of ejectment is concerned, to be considered the real plaintiff, though in fact merely nominal. The party, therefore, in whose name the demise is laid cannot release the action. 4 M. & S. 300.

The English notice at the foot of the declaration was subscribed by the nominal plaintiff, instead of the casual ejector, and the rule for judgment was discharged. Barnes, 172. 1 Barnard, 116.

The court refused to set aside the proceedings for irregularity upon a similar objection being made. 3 T. R. 351.

The notice at the foot of the declaration was not signed, and the court set aside the proceedings for irregularity. 1 Barnard, 43.

In certain cases the court will permit an amendment to be made in a notice at the bottom of the declaration. 7 T. R. 469.

Ejectment against several tenants, the name of each was prefixed to the notice served on him; only one rule necessary on motion for judgment against the casual ejector. 7 T. R. 477.

There is no distinction between judgment on verdict, or by default.

[\*]An action for mesne profits is consequential to a recovery in ejectment, and may be brought by lessor of plaintiff in his own name, or that of the nominal lessee.

The tenant is concluded by the judgment, and cannot controvert the title; consequently, cannot controvert plaintiff's possession, which is part of his title.

This judgment only concludes the parties as to the subject-matter of it; beyond the time laid, it proves nothing at all.

As to the length of time the tenant has occupied, or as to the value, the judgment proves nothing; therefore they must be proved, and the occupation must be within the time laid in the demise. R. by all the Judges unanimously. 2 B. M. 665.

If one tenant in common recover against another in ejectment, by default; trespass lies for the mesne profits. 3 Wils. 118.

If tenant in possession absconds, and plaintiff (the landlord) serves his house-keeper, and fixes another copy of declaration on the premises, on motion and service of the rule in like manner, judgment shall be entered against casual ejector. 2 B. M. 1116. 2 B. M. 1181.

The court will not arrest judgment of Hilary, 1 G. 3., because the declaration alleges defendant entered against the peace of the said king, and lays the demise in the thirty-third year of the said king. 2 B. M. 1159.

If the declaration is wrong entitled, (as, 17 G. instead of 16 & 17 G.) no rule for judgment. Barnes, 186.

On nonsuit for want of confessing lease, &c. plaintiff must proceed for costs on the common rule; if, instead thereof, he takes *fi. fa.*, it shall be set aside. Barnes, 182.

If the lessor of the plaintiff abandon the action after the appearance of the tenant, or landlord, and refuse to join in the consent rule, he is held not liable to the defendant's costs, upon the principle, that until he has put his signature to the rule, he has not consented to proceed against the new defendant. 2 Blk. 904.

The remedy for recovering the costs of a nonsuit, upon the merits in ejectment, is by attachment, after service of a copy of the consent rule, and allocators, and refusal to pay. 3 Taunt. 485.

Where the lessor of the plaintiff dies after nonsuit in ejectment, the court will not grant a *distringas* upon his goods, for a contempt in the executor in not obeying the order upon the consent rule to pay costs. 2 Smith, 407.

There is no judgment for costs, where the judgment is against the casual ejector; but action for mesne profits lies, in which the expenses may be recovered. Loft. 451.

On judgment against the casual ejector, mesne profits should be recovered from the delivery of declaration to tenant in possession, or from actual demand; on judg-

ment against tenant in possession, (or landlord), from *ouster* admitted by common consent-rule. Barnes, 87.

Actions for mesne profits should not be favoured, as they tend to create double expense, and plaintiff should be ready at trial of ejectment to prove his damages. Ibid.

In action for mesne profits, if the tenant has been served, but has not entered into the common rule, the title need not be proved, but possession must be proved in both; if he has entered into common rule, if action is by lessor, his possession must be proved; if by lessee, it need not. Barnes, 456. 472, 473.

Action for mesne profits may be brought in name of nominal plaintiff, after judgment by default against casual ejector; costs of ejectment inserted in declaration as consequential damages; on trial, it is sufficient to give in evidence, the judgment, writ of possession, and return of execution, defendant's [\*] occupation of premises, their value, and costs of ejectment. Barnes, 472, 473.

If a rule to defend for two-thirds, and judgment for the rest, there should be an indorsement of what part to take possession. Barnes, 191.

If judge who tried cause reports that general verdict was good for part, bad for part; rule that plaintiff shall take possession of that part only which judge reported good. Barnes, 468.

If the sheriff, on ejectment for five-eighths of a cottage, give possession of the whole, the tenant shall be restored to his possession of three-eighths. 3 Wils. 49.

If judgment is regularly obtained against casual ejector, the tenant having neglected to give notice to his landlord, (an infant), the court will set aside judgment and writ of possession, order tenant to pay costs, and landlord to be made defendant under terms. 4 B. M. 1996.

Judgment signed against casual ejector for mistake in body of plea of name of lessor of plaintiff, instead of nominal plaintiff, shall be set aside with costs. Barnes, 191.

If declaration is delivered without prothonotary's name on it, yet on motion the court will make rule for judgment, unless appearance in the usual time, notice of prothonotary's name being given. Barnes, 192, 193.

Proceedings shall be staid, if the premises are lands in ancient demesne. Barnes, 194.

< In ejectment, where there are several defendants, who possessed separate parts, of the premises demanded, and who entered into the consent rule, and pleaded jointly, the jury found the defendants severally guilty, as to the parts by them possessed, respectively, and not guilty as to the residue, judgment will be entered against them severally. Jackson v. Woods, 5 Johns. Rep. 278.

So, if several defendants appear, enter into the consent rule, and plead jointly, the plaintiff, in order to recover against them all, must prove a joint possession. Jackson v. Huzen, 2 Johns. Rep. 438.

A judgment in ejectment cannot be enforced after the term of the demise has expired. Jackson v. Haviland, 13 Johns. Rep. 229. Vide Campbell v. Les. of Gratz, 6 Binn. 115. Robinson v. Campbell, 3 Wheat. 212. Baker v. Seckright, 1 Hen. & Munf. 177. Hunter v. Fairfax's Devisee, 1 Munf. 218.

But where the title of the lessor, being a life estate, ends before trial, the plaintiff shall nevertheless, have judgment to enable him to recover the mesne profits; but with a perpetual stay of the writ of possession. Jackson v. Davenport, 18 Johns. Rep. 295.

In ejectment by one tenant in common against his co-tenant, and the consent rule was entered into, in common form, for the undivided moiety, and the plaintiff proved title to an undivided moiety only; the defendant is entitled to judgment as to the one moiety, though the plaintiff must have judgment, by default, as to the other. Jackson v. Lyons, 18 Johns. Rep. 398. >

[\*433]

(3 A 1.) PROCEEDING IN A WRIT OF ENTRY.

A writ of entry is of divers natures. Vide Action, (D 2.)—Vide dum fuit infra Ætatem, (A.)

The process is summons and *grand cape*, and after appearance a *petit cape*.

And therein shall be a view, imparlance, voucher, *aid prier*, and resceit.

A writ of entry *sur disseisin* lies only against the tenant of the freehold. Vide Com. Att. 132. or 157. edit. 1695. West. Symb. 2 Pt. 76. b.

And if it is upon a disseisin by the tenant himself to the demandant or his ancestors, it is in the nature of an assise, and is called a writ of entry in the *quibus*. (Vide F. N. B. 191. C.)

If upon a disseisin by any, by whom the tenant claims, it shall be a writ of entry in the *per*. (Vide F. N. B. 191. D.)

If upon a disseisin by B. to whom A. owes title, by whom the tenant claims, it shall be in the *per & cui*. Ibid.

If upon a disseisin beyond these degrees, it shall be a writ of entry in the *post*. (Vide F. N. B. 191. D. 192. F.)

A writ of entry *sur disseisin in le post* lies at the common law.

So, upon intrusion; but it did not lie upon alienation in the *post* till the st. Marl. 52 H. 3. 30.

(3 A 2.) To have a common recovery.—The manner of passing it.

When it shall bar an entail, vide Estates, (B 27, &c.)

Upon a writ of entry *sur disseisin in le post*, the common recovery for assurance of lands is usually suffered.

[\*]And for passing such recovery, an attorney of C. B. must make a note of the *præcipe*, by which the cursitor may draw the writ of entry, and which mentions the demandant, tenant, and the particulars of the land. (Comp. Att. 133. or 155. edit. 1695.)

This note shall be entered upon the remembrance of the prothonotary, with the *teste* and return of the writ of entry, and the names of the vouches, and of the sheriff who makes the return. (Com. Att. 132. or 155.)

If the tenant and vouches appear in person at the bar, the recovery may be suffered at the bar before the writ of entry is sealed. (Vide Com. Att. 132. or 157.)

If the tenant or vouches do not appear in person, there must be a warrant for an attorney to appear for them. (Vide Com. Att. 133. or 158.)

And the party must appear before him who takes the warrant of attorney, and acknowledge the warrant, upon which the judge or commissioners subscribe their names and the day of the caption. Ibid.

Any judge or baron, and any serjeant in his circuit, may take a warrant of attorney without a *dedimus potestatem*. Ibid.

If any other takes it, he must have a *dedimus potestatem*. West. Symb. 2 Pt. 76. b.

After the warrant of attorney acknowledged, a writ of entry shall be sued. (Vide Com. Att. 133. or 138.)

And a fine for alienation shall be paid upon it, as upon a fine. (Vide West. Symb. 2 Pt. 76. b.)

Then it shall be sealed, and delivered to the prothonotary, who enters it

and indorses the return, and makes a copy of the count, and re-delivers them to the attorney. (Vide Com. Att. 123, 124. or 158, 159.)

If the recovery is with single voucher, or with double, and the vouchee appears in person, when the tenant has made his warrant of attorney, and the writ of entry is sealed, entered, and returned, the recovery may pass at the bar the same term. (Vide Com. Att. 124. or 159.)

But, if the vouchee does not appear in person but by attorney, there must be a summons *ad warrantizandum* for him, as well as a warrant of attorney. (Vide Com. Att. 123, 124. or 158, 159.) [Vide post, (3 A 6.)]

By the st. 16. Car. 2. the return of the summons shall be at the fifth return after the *teste* inclusive.

But by 24 G. 2. c. 48. s. 8. the writ of summons shall be made returnable the fourth return inclusive.

And the usual course is to *teste* it the fourth day inclusive from the return of the writ of entry. 2 Bl. 1201.

And the vouchee cannot appear before the return of the writ. 1 Wils. 35. Vide post, (3 A 6.)

And at the return of the summons the recovery may pass.

So, a common recovery may be suffered upon a writ of right upon a *præcipe in capite*. (Vide West. Symb. 2 Pt. 79.)

But the demandant need not appear in person, or by attorney. (Vide Com. Att. 123. or 158.)

[\*]After the recovery is passed, the writ of entry shall be filed with the *custos brevium*. (Vide Com. Att. 157. West. Symb. 2 Pt. 77. b.)

And by the st. 23 El. 3. it may be inrolled in the office of inrolments; and if it is afterwards lost, the inrolment shall be of the same effect as if the writ was extant. Lit. 299.

So, if a writ of entry is lost out of the office, when it appears to be once filed, upon a petition to the chancellor it may be supplied by a new writ *nunc pro tunc*. Ibid.

But, if it does not appear that it was ever filed, it shall not be supplied. Ibid.

### (3 A 3.) Against whom a writ of entry lies.

A writ of entry for a common recovery ought to be against him who has the freehold of the estate: (By st. 14 G. 2. 20. the recovery shall be good, without the surrender of freehold leases at reserved rents); and therefore, if it is against him in remainder after an estate for life, it is error. R. 2 Leo. 57.

And by the same statute, it is sufficient if the deed or fine to make a tenant to the *præcipe* be levied or executed before the end of the term, great sessions, session or assizes, in which the recovery is suffered.

How a good tenant to the *præcipe* shall be made, vide Recovery (B 3.)

But it is sufficient that the tenant has the freehold before the return of the writ of entry, though he had not at the *teste*. (Vide Com. Att. 157.)

Or, at any time before judgment, though it is after the return of the writ and voucher. Sho. 347.

So, a common recovery by a tenant in fee is a bar to him and his heirs, though it is not against the tenant of the freehold. D. Ray. 323.

So, a recovery by husband and wife of the wife's land bars them and their heirs. Pr. Reg. 490. Cro. Car. 389.

So, a recovery by *cestuique trust* in tail bars the estate-tail in equity, though there be not a legal tenant of the freehold. Vide Chancery, (4 S 4.)

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(3 A 4.) Of what things.

A writ of entry lies of all things demandable in a *præcipe*. Vide West. Symb. 2 Pt. 77. a.

Of an advowson in gross, and one acre of land, *sur disseisin in le post*. 2 Wila. 116.

But it does not lie of a garden, croft, or cottage. 1 Rol. 2.

Nor, *de superiori camera*. (Vide West. Symb. 2 Pt. 77. b.)

Nor, *de stagno, fossato, piscaria*. (Ibid.)

Nor, *de communia pastur*. (Ibid.)

Nor, of services; as, homage, fealty, &c. (Ibid.)

Nor, of estovers, *minera, fodina, mercatu*. (Ibid.)

[\*] *Nec, de selione, bovata, or virgata terra*, for they are uncertain. (Ibid.)

Nor, ought to name the same thing twice; for it will be *bis petit*. (Ibid.)

Nor, *de tenemento*. Semb. Mo. 691.

The writ must describe the lands demanded in a vill, parish, or hamlet. Hut. 105.

Or, in a place known out of the vill, parish, or hamlet. Ibid. 2 Mod. 49.

As, within the liberty of S., for this is in the nature of a place known, and it will be good for lands in a vill within the same liberty. R. 2 Mod. 48.

But if it mentions a vill, and a hamlet within the same vill, it is bad. (Vide West. Symb. 2 Pt. 77. b.)

Or, a place known within a vill or hamlet. Hut. 105.

So, if it is agreed to have a recovery of Southwick marsh in Cambey island in the parish of N., and the recovery is of lands in A. B. and Cambey, omitting N., the land in N. does not pass; for Cambey, though it is a place known, is within several parishes. Ibid.

Yet, if a recovery be of a manor, this extends to a manor in reputation, Cont. Noy, 7.

And to land reputed of the manor; if, by the indenture to lead the uses, it was intended to be conveyed. R. 1 Vent. 51, 52. 1 Sid. 190.

So, if the recovery is of land in A. and there is a parish and a vill in it called A., and by the indenture it appears that the recovery was intended of the land in the parish of A. it shall be good for lands in the parish. R. Mod. 250. 2 Mod. 233. 2 Vent. 31.

There is not so much certainty of description required in a recovery as in an adverse action. Cowp. 349.

(3 A 5.) Count.

When a common recovery is suffered, the demandant counts, and the defendant makes defence as in an adverse action.

(3 A 6.) Voucher.

If the recovery is upon double voucher, the tenant vouches the tenant in tail, or him who is intended to be barred by the recovery, and prays that he may be summoned.

When the vouchee appears, the demandant shall count against him, and he vouches the common vouchee.

And in a writ of entry *sur disseisin in le post*, any one may be vouched, and he need not be within the degree.

The vouchee must appear either by attorney, or in person. 1 Leo. 86.

And regularly, when he appears by attorney, he must acknowledge his warrant, and the day of the caption shall be returned. Vide ante, (3 A 2.)

And the warrant of attorney and *dedimus potestatem* (if it is acknowledged upon a *dedimus potestatem*) ought regularly to be dated after the summons *ad warrantizand*.

[\*] Yet, if they are tested before the summons, it will be good. R. 1 Lev. 130. 1 Sid. 213. Ray. 70.

Or, the warrant of attorney is tested after appearance; for it shall be intended that he appeared without process, as he may. R. 1 Sid. 213. Ray. 70. 96.

It is no objection to passing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar, and the *dedimus*, varies. 1 Bos. & Pull. Rep. 31.

Nor, that the warrants of attorney of the several vouchees are on separate pieces of parchment. Ibid.

The common vouchee cannot appear by attorney before the day of the return of the writ of summons. Willes, 563. Barnes, 17. S. C.

If the vouchee die before the return of the writ of summons, the recovery is erroneous. Barnes, 17. S. C.

But now the *teste* of the writ of summons must precede the actual acknowledgment of the warrant of attorney by the vouchee. 2 Bl. 1201.

And by rule of C. B. Hil. 14 G. 3. an affidavit must be made of the true time of the caption of the warrant. Ibid. 1202.

If the vouchee reside in a foreign country at such a distance that the warrant of attorney cannot be returned before the return of the writ of summons, the tenant's appearance may be entered in the term in which the writ of summons is returnable, and then they may imparl from term to term, till the warrant of attorney arrive, when the recovery may be arraigned; and then if the vouchee was alive at the time of the arraignment, the recovery will be valid, otherwise not. 2 Bl. 1224

And, if there be a writ of summons, he may afterwards appear by attorney, or in person. R. 1 Leo. 86.

But if there is not a writ of summons, he cannot appear by attorney. Ibid.

Yet, if the appearance by attorney is entered by the court without summons, it is well. R. 1 Leo. 291.

So, if the vouchee makes a warrant of attorney, and dies in the morning of the first day of the term, and the recovery passes the same day, it will be good. R. 1 Co. 93. 106. b. Mo. 136.

But if the vouchee, after the warrant of attorney made, dies before the term, it will be error. D. 2 Vent. 90.

And in such case the court will stay the passing of the recovery. R. Ibid.

If the writ of summons is returnable at a return within the term, the *essoin-day* of which is a Sunday, and on that Sunday the vouchee dies, the recovery is bad; for the judgment cannot relate to any day prior to the return, and judgment cannot be given on a Sunday. 3 B. M. 1595. Affirmed (on the opinion of all the judges,) in the house of lords, 2 May 1766.

If the vouchee dies six days before the return of the writ of summons, it is error, and the judgment cannot be made good by relation to the first day of term; and though it appears on the face of the record that the vouchee appeared by attorney at the return of the writ of summons, yet plaintiff is not estopped to assign it for error, for it is collateral matter, and not contrary to the record. Wils. 35. 42.

The death of the vouchee before judgment is error, and may be assigned as such. 1 B. M. 410.

### [\*](3 A 7.) Judgment and execution.

After an imparlance allowed and default of the common vouchee, there shall be judgment against the tenant, and that he recover in value against

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the vouchee, and he against the common vouchee. (Vide West. Symb. 2 Pt. tit. Recoveries.)

After judgment an *habere facias seisinam* shall be awarded.

And a recovery found by special verdict, without any writ of seisin awarded, is bad, and is no bar. 1 Wils. 55.

Which shall be tested upon the day of the return of the writ of summons, or (if there was no summons) of the writ of entry. (West. Symb. 2 Pt. 77. b.)

And it shall be returnable *indilate*, or at a day certain. (Com. Att. 157.)

Upon which the sheriff returns, that he delivered seisin. (West Symb. 2 Pt. 77. b.)

The writs of summons and of seisin, as well as the writ of entry, shall be filed with the *custos brevium*. (West. Symb. 2 Pt. 77. b.)

If tenant in tail suffers a recovery, the recoverors are not in possession till execution sued by a writ of seisin.

Though he had made a lease for years, and the recovery was of the reversion. R. 1 Co. 94. a. 106. a.

But execution may be sued out, though the tenant in tail dies before the recovery executed. Co. Lit. 361. b. R. 1 Co. 94. a. 106. a. Mo. 137.

And if execution is sued and returned upon record, it is well, though seisin was not actually given, nor the recoveror entered. Dub. 2 Leo. 48.

By the st. 23 El. 3. the writs of entry and summons, and warrants of attorney, may be inrolled, &c.

And no recovery shall be reversable for false Latin, rasure, interlining, misentering the warrant of attorney, misreturning or not returning of the sheriff, or other want of form.

How error shall be sued to reverse a common recovery, vide Th. Br. 99, 100, &c.

### (3 A 8.) How a recovery shall be pleaded.

A common recovery is a record, and must be pleaded entire. Hob. 24.

So, if a common recovery is pleaded, it must be shewn to be a good recovery. Vide how pleaded, Lut. 833. 1550. 963.

He must plead that the recovery was executed, for till execution he was seised in tail as before. R. Jon. 10. Lut. 1550. R. cont. but Lev. makes a quære, 2 Lev. 31.

And therefore, if he says that a recovery was had *de tenementis prædict.*, it is bad; for he ought to shew that it was by such names, of which a *præcipe* lies. R. Mo. 691.

So, if he pleads that A. being seised in tail, a *præcipe* was brought against B. *ad tunc tenen. liberi tenementi*, without shewing how he had [\*] the freehold, it is bad. R. 1 Mod. 218. 2 Mod. 70. Semb. cont. Lut. 1549.

Or, that A. being seised for life, remainder to B. in tail, a recovery was had against B. *tunc tenen. liberi tenementi*, &c. 3 Co. 59. a.

So, if he says that *cestuique use* entered *super recuperationem prædictam*, and was seised in fee, it is bad; for he ought to shew entry or execution by force of the recovery, and seisin by force of the st. 27 H. 8. 10. R. Jon. 10.

If a special verdict finds a common recovery, but does not find writ of seisin or execution, no advantage can be taken of the recovery; nor shall a *venire facias de novo* go, though there was in fact a writ of seisin and a return, as appears by a verdict in another cause. Str. 185. affirmed on er-

ror in parliament by the unanimous opinion of Hardwicke C. and all the judges. Wils. 48,

### (2 B) PROCEEDING IN ERROR.

#### (3 B 1.) In what court it shall be brought.—When in the same court.

Error shall be brought in the same court where the judgment was, or in another court.

Error may be in the same court where the judgment was given, when the error is not assigned for any fault in the court, but for some defect in the execution of process. 1 Rol. 746. l. 6. Yel. 157. F. N. B. 21. l.

So, for default of the sheriff or other officer upon an irregular process : as, if the defendant is outlawed upon an *exigent* awarded before a *pluries capias*, or upon a *capias ad satisfaciendum*, where no *capias* lies in process. 7 H. 6. 28. b. R. Dy. 196. a. 1 Rol. 746. l. 15, &c.

So, for misprision of the clerk : as, for false Latin, &c. 1 Rol. 746, l. 9. F. N. B. 21. l. { Vide Frazier v. Cosbie, 2 Wash. 130. }

So, for default in execution. R. 1 Rol. 746. l. 11.

So, for error in fact : as, that the defendant appeared by attorney, being an infant ; that the plaintiff was a *feme-covert*, or died before issue, &c. R. 1 Rol. 747. l. 5. 20. { Vide Dewitt v. Post, 11 Johns. Rep. 460. Day v. Hamburgh, 1 Browne, 75. }

And for error in fact, it must be in the same court. 1 Sid. 208. except where it was in the Exchequer. R. 3 Lev. 38. Vide post, (3 B 4.)

Error *coram vobis* lies not on a judgment after affirmance in Exchequer-chamber. Str. 690.

So, in criminal cases upon indictment, error may be in B. R. upon a judgment in the same court, as well for error in law as for error in fact. R. 1 Lev. 149. [3 Salk. 147.]

But *semb.* that it was only for error in fact. 1 Sid. 208.

But error in the same court, which *coram vobis residet*, does not lie for default of the court itself : as, if error be assigned for matter in law. 1 Rol. 746. l. 4. R. Mo. 186. { Vide Anon. Tay. 146. }

Or, for default in *adjudicatione executionis*. R. 1 Rol. 746. l. 55.

Or, for default of a continuance. R. Dy. 196. a.

[\*]If writ of error be quashed for any fault but variance, error *coram vobis* lies. Str. 606. Ld. Raym. 1408.

#### (3 B 2.) When in C. B.

Error lies in C. B. of a judgment before justices of assise. 1 Rol. 745. l. 39. But it was R. cont. Dy. 250. 1 Leo. 55. 3 Leo. 159.

So, of a judgment in London, or other inferior court. F. N. B. 20. D.

So, a writ of false judgment lies in C. B. as well as in B. R. 2 Inst. 138.

#### (3 B 3.) In B. R.

Error lies in B. R. of a judgment in C. B. 1 Rol. 744. l. 46. 4 Inst. 22.

Or, of a judgment upon the plea-roll in Chancery. Dy. 315. 1 Rol. 744. l. 55. 4 Inst. 80. Pl. Com. 393. a.

Or, in a county palatine, Dy. 321. Dav. 62. 1 Rol. 745. l. 10. 21 H. 7. 33. b.

Or, in the cinque ports. Dub. 1 Sid. 166. Vide cont. infra.

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So, of a judgment in Ireland. 1 Rol. 745. l. 22. Dav. 62. 7 Co. 18. a. Vau. 290. 298. F. N. B. 24. C. 3 Mod. 170.

But since the st. 22 G. 3. c. 53. a writ of error lies from the B. R. in Ireland to the house of lords there, and not to B. R. here.

Or, in any of the king's dominions : as, Calais, &c. Vau. 290. 402. Cont. Kel. 202. b. Acc. 4 Inst. 282. Cont. 21 H. 7. 33. b.

So, in Wales. Cont. 1 Rol. 745. l. 27. 30. 21 H. 7. 33. b. By the st. 28 H. 8. 3.—(This statute is mentioned in Cay as expired, and *qu.* if it should not be 27 H. 8. 26.)

In a real action, though error in a personal action is before the president and council of the marshes. Mo. 248.

So, in an ejectment in Wales : though it is a mixt action. R. Mo. 248.

So, error lies in B. R. upon a judgment against a peer attainted before the lord high steward. Per Twisd. 1 Sid. 208. 1 Lev. 149.

And upon a judgment at the sessions of Old Bailey by commission. 2 Leo, 107.

So, upon a judgment in London before the mayor, upon an information. 2 Cro. 538. Vide infra.

But error does not lie in B. R. of a judgment in the Exchequer. 4 Inst. 71. 106.

Or, of a judgment before justices in eyre. 1 Rol. 745. l. 35.

Or, of a judgment in London. 2 Leo. 107. Vide supra.

Or, a judgment in the cinque ports. 1 Rol. 745. l. 5. R. Dy. 376. Dub. 1 Sid. 166. Vide supra.

Or, a judgment in the stannaries. 1 Rol. 745. l. 20.

Nor upon a judgment in a summary way before the censors of the college of physicians. R. 1 Sal. 144.

Nor, upon a judgment in B. R. upon a case stated sent to them by chancery. Mod. Ca. in Eq. 5.

### [\*](3 B 4.) In the Exchequer.

By the st. 27 El. 8. on judgment in B. R. in debt, detinue, covenant, account, action upon the case, trespass, or ejectment, the party grieved may remove the record into the Exchequer, before the justices of C. B. and barons of the Exchequer, who, or six of them at least, may affirm or reverse the judgment, but not for want of jurisdiction in B. R., or want of form, &c. Lev. Ent. 82. Vide Courts, (D 6.)

And this extends to debt upon the st. 2 Ed. 6. 13. for not setting out his tithes. Cro. Car. 142. 1 Sid. 240.

And debt upon the st. of usury. Dub. 1 Sid. 240. D. cont. 5 Mod. 230.

Though the action be by the king and party. D. Cro. Car. 142. R. Ray. 275. Cont. 1 Vent. 49. Acc. Doug. 353. n.

And error lies in the Exchequer for error in fact, as well as for error in law. R. Cro. El. 731. R. 2 Cro. 5. R. Hob. 5. Per three J. Berkeley cont. Cro. Car. 514. Vide infra.

And it shall be tried by *nisi prius* out of the Exchequer. Cro. Car. 514.

So, for error in proceedings in B. R. 5 Co. 28. a.

But error does not lie by this statute in the Exchequer, when the suit is commenced in B. R. by original. D. 1 Sand. 346. 1 Sid. 424.

Nor, upon a judgment in B. R. in a writ of error. 2 Bul. 162.

Nor, where the king is a party : as, in an action by *qui tam*, &c. Ley, 82. [Cont. Doug. 353. n. (Vide supra.)]

Nor, in an action not mentioned in the statute, for it shall not be extend-



ed by equity : as, in rescous, though it is of the nature of trespass. R. 2 Cro. 171.

Nor, in replevin. Cro. Car. 142. 2 Rol. 140.

*In scandalum magnatum* ; for it is not a mere action upon the case, but founded upon the st. 2 R. 2. R. Cro. Car. 142. R. 1 Sid. 143. Jon. 194, 195. 1 Vent. 49. R. Ley, 82. Jon. 423. [Doug. 351.]

Error does not lie in the Exchequer upon an award of execution in a *scire facias* only, but the writ must also include the judgment in the former action ; for a judgment not founded on the merits of the cause is not within stat. 27 Eliz. c. 8. And. 287.

Nor, in a *scire facias* against bail. R. cont. Cro. El. 730. R. ac. 2 Cro. 171. Yel. 157. Hob. 72. 2 Cro. 384. R. acc. Cro. Car. 300.

Or, a *scire facias* against an executor or administrator upon a judgment in debt. Adm. cont. 2 Cro. 186. Dub. Cro. Car. 286. Semb. acc. per three J. Cro. cont. Cro. Car. 464. Cont. per Hale, Mod. 79. and per Holt, 1 Sal. 263.

Nor, in a *scire facias* upon a judgment in debt or other action named in the st. 27 El. after an affirmance of the first judgment in the Exchequer. R. 5 Mod. 230. 1 Sal. 263.

So, error does not lie in the Exchequer for error in fact, except such by which the writ abates. R. Hob. 5. R. 2 Lev. 38. Vide supra.

So, if a writ of error in the Exchequer is discontinued, after the [\*]record removed, error does not lie, which *coram vobis*, &c. but there must be a new writ of error. R. Jon. 14. Semb. cont. 2 Cro. 135. R. acc. 2 Cro. 384. 620.

A writ of error from B. R. into the Exchequer-chamber cannot be quashed in B. R. Doug. 350.

Nor, in the Chancery. Ibid. n.

### (3 B 5.) In the Exchequer-chamber.

By the st. 31 Ed. 3. 12. on complaint of error in the Exchequer, the lord chancellor and lord treasurer shall cause the record to come before them, and taking the justices and other sages as to them seemeth, and calleth the barons to hear their informations, and the causes of their judgments, shall examine the business, and if they find any error, amend the rolls, and send them to the Exchequer, &c. for execution.

Before, error in the Exchequer was examined in parliament, or before special commissioners. 4 Inst. 105. Vide Parliament, (L 6.)

The chancellor and treasurer are the judges here, and judgment shall be entered pursuant to their sentence, though the other justices differ in opinion. 4 Inst. 105. R. 7 W. 3. inter Att. Gen. and Hornby. 5 Mod. 42. R. 8 H. 7. 13. a.

And therefore, if there is no chancellor or treasurer, error cannot be brought. Dub. Hard. 147.

But, by the st. 16 Car. 2. 2. if the chancellor or treasurer, or either of the chief justices, be present, error shall not abate or be discontinued ; but no judgment shall be given unless both lord chancellor and treasurer be present ; or by the st. 20 Car. 2. 4. if lord keeper be present in the vacancy of lord treasurer.

For a more full account of the statutes relating to this court of error, vide Courts, (D 6.)

The writ of error shall be directed to the treasurer and barons ; for the record is in their custody. 4 Inst. 105. Sav. 36. 1 Co. 11.

And it lies upon a judgment, where the trial is by records, as well as upon a judgment by confession, upon a verdict or a demurrer. R. 4 Leo. 104, 105.

So, it will be error, if the chancellor and treasurer do not call in the other justices. Semb. 8 H. 7. 13.

Error does not lie in the Exchequer-chamber on an award of execution only. Str. 1102.

**(3 B 6.) In parliament, &c.**

Error of a judgment in B. R. lies in parliament. 4 Inst. 21. Vide Parliament, (C 1, &c.)

As well for error in a judgment there given upon a writ of error, as in an original cause. 1 Rol. 745. l. 25. 2 Sand. 214. Ha. J. P. 21. Godb. 247.

So, though error may be in the Exchequer, by the st. 27 El. 8. in several cases ; yet it may be in parliament *immediate*. R. Ca. in Parl. 56.

[\*]Or, after judgment in the Exchequer. Ca. Parl. 110. and this by the st. 27 El. 8.

So, error lies in parliament upon a judgment in the Exchequer-chamber. Ca. Parl. 12. 58.

But upon an original judgment in the Exchequer, error does not lie in parliament, before it is affirmed in the Exchequer-chamber. Ca. Parl. 56. Sal. 511.

So, upon a judgment in Chancery, it lies in parliament as well as in B. R. D. 37 H. 6. 14. b. 1 Rol. 745. l. 4.

So, upon a judgment before justices in eyre. 1 Rol. 745. l. 35.

Or, a judgment before commissioners at St. Martin's. 2 Sand. 228.

So, error lies in parliament upon an attainder for treason : for though the st. 33 H. 8. 20., says that judgment of attainder by common law shall be of as good force as if done by authority of parliament, this shall be intended of a lawful attainder. Ha. J. P. 19.

So, upon a judgment for the king as well as for a common person. Ha. J. P. 22.

So, upon a judgment in appeal, by which the defendant was acquitted. H. Parl. 20.

But it does not lie in parliament upon a judgment in C. B. before it is affirmed in B. R. H. Parl. 20, 21.

**In other courts.**

Error of a judgment in the hustings of London lies before commissioners at St. Martin's. 1 Rol. 745. l. 50. 4 Inst. 247. 1 Lev. 309. 2 Sand. 228.

Of a judgment before the sheriffs of London, lies in the hustings there. H. 4 Inst. 247, 8.

Of a judgment in the Cinque Ports, lies before the warden of the Cinque Ports at Shepway. 1 Rol. 745. l. 7. Vide Franchises, (E 2.)

Of a judgment in the stannaries an appeal lies to the warden of the stannaries, and from him to the prince ; or, if no prince, to the king's council. 1 Rol. 745. l. 20.

**(3 B 7.) Upon what judgment.**

Error lies of any judgment in a court of record. { Vide Commonwealth  
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*v. Judges of Common Pleas*, 3 Binn. 273. *Beale v. Dougherty*, 3 Binn. 432. }

Though it be void, as being out of the jurisdiction in an inferior court. 1 Rol. 744. l. 30.

Though it be upon a writ of false judgment ; for the last judgment is of record. 1 Rol. 744. l. 27.

It lies upon a judgment for costs upon a nonsuit. 1 Rol. 744. l. 23. [Str. 235. 1 H. Bl. 432.] { *Smith v. Sutts*, 2 Johns. Rep. 9. *Wilson v. Force*, 6 Johns. Rep. 110. *Schermerhorn v. Jenkins*, 7 Johns. Rep. 373.

So, it will lie upon judgment of nonsuit, though no costs are awarded. *Lovell v. Evertson*, 11 Johns. Rep. 52. }

Upon a judgment in *scire facias* upon a statute or recognizance. Dy. 315. 1 Rol. 744. l. 40. 751. l. 45.

Upon a judgment by any judge or court of record, which acts according to the course of the common law, though newly erected by act of parliament. R. 1 Sal. 263. { *Vide Commonwealth v. Ellis*, 11 Mass. Rep. 466. }

[\*] Upon a judgment on an indictment. Adm. 1 Sal. 266.

If defendant is found not guilty as to part, there must be a judgment for him as to that part, or error lies. Str. 786.

But error does not lie upon a decree in chancery. 37 H. 6. 14. b. 1 Rol. 744. l. 44.

So, it does not lie upon a peremptory *mandamus*. R. in B. R. and aff. in parliament, 2 Mod. Ca. 27. Str. 536.

Nor, on a *mandamus*, when the return is allowed. Str. 625.

Nor, upon an order by justices of the peace, though they are justices of record. 1 Rol. 744. l. 48. Dub. 2 Jon. 167.

{ Nor on an order for arrest of judgment. In such case, the court will on motion, vacate the rule for arresting judgment, and enter judgment for the defendant for the insufficiency of the declaration, on which error may be brought. *Fish v. Weatherwax*, 2 Johns. Cas. 215. *Bayard v. Malcomb*, 2 Johns. Rep. 101. *Horne v. Barney*, 19 Johns. Rep. 247. *Vide Benjamin v. Armstrong*, 2 Serg. & Rawle, 392. }

Nor, upon refusal of a prohibition in B. R. Semb. 1 Sal. 136.

Nor, upon an order, &c. of a jurisdiction newly erected which does not proceed according to the common law. 1 Sal. 263. { *Vide Ruhlman v. Commonwealth*, 5 Binn. 24. }

Nor, upon a *habeas corpus* denied. Dub. Sal. 504. D. 2 Mod. Ca. 29. { *Sed vide Yeates v. The People*, 6 Johns. Rep. 337. cont. }

Nor, for a matter of fact, which does not appear upon the record ; as, if a statute staple is not sealed. R. Cro. El. 233.

Nor, does it lie upon an interlocutory judgment before the final judgment : as, upon a judgment in partition, *quod partitio fiat*. Co. Lit. 168. a. 11 Co. 40. b. R. 2 Rol. 126. [Ld. Rd. 610. 6 East, 333.] { *Vide Clason v. Shotwell*, 12 Johns. Rep. 31. }

Upon a judgment *quod computet* in account. R. 11 Co. 38. b. 2 Cro. 356. R. 2 Cro. 324. 1 Rol. 750. l. 5. 2 Bul. 104.

Upon a judgment in trespass, &c. by default, before a writ of inquiry returned and final judgment thereon. R. 1 Leo. 193.

Nor, does it lie upon a judgment for part, till the whole plea is determined : as, in a suit against several, if there is judgment against one, error does not lie till judgment against all the defendants. 11 Co. 39.

[\*444]

Nor, if the judgment is for part of the demand, till judgment for the whole. 11 Co. 39. b. R. Dy. 291. b.

Yet, if the party dies, so that nothing more is done, error lies for the party grieved by the award or interlocutory judgment. 11 Co. 41. a.

So, in ejectment, error lies upon the judgment for the term, before a writ of inquiry. R. Latch, 212.

Or, if there is a suit against several upon several originals, error lies upon a judgment against one. 11 Co. 41. a. 2 Rol. 126.

So, it lies after final judgment, before execution or writ of inquiry. 1 Rol. 751. l. 13. 20. 750. l. 35. 40. 50. 749. l. 45. 52.

{ Error will not lie on a judgment upon a matter which rests in the discretion of the court; as on a judgment refusing a new trial, &c. Granger v. Byssell, 2 Day, 364. Lewis v. Hawley, 1 Conn. Rep. 49. Burke v. Young's Les. 2 Serg. & Rawle, 383. Burd v. Dansdale, 2 Binn. 80. Wright v. Small, 2 Binn. 93. Henderson v. Moore, 5 Cranch, 11. Marine Ins. Co. v. Young, 187. Barr v. Gratz, 4 Wheat. 213. Marine Ins. Co. v. Hodgson, 6 Cranch, 206. Liter v. Green, 2 Wheat. 306. Armstrong v. Wright, 1 Ruff. 93.

Or a refusal to direct a nonsuit. Girard v. Getting, 2 Binn. 235.

Or a refusal to continue a cause. Woods v. Young, 4 Cranch, 237. Marine Ins. Co. v. Hodgson, 6 Cranch, 206. Armstrong v. Wright, 1 Ruff. 93.

Or a refusal to reinstate a cause after nonsuit. United States v. Evans, 5 Cranch, 280. Welch v. Mandeville, 7 Cranch, 152. }

### (3 B 8.) At what time it shall be sued.

And therefore, if a writ of error is sued out before final judgment, though a *mittit*. is entered upon the roll, and the record certified; yet it is not thereby removed. R. 11 Co. 41. b.

If the writ of error is returnable before judgment, it shall be quashed. Str. 891.

But a writ of error may be sued out as well before interlocutory as before final judgment, and therefore will equally operate as a stay of proceedings. 2 M. & S. 384. { Vide Richardson v. Backus, 1 Johns. Rep. 493. }

Yet, after judgment signed, error may be sued before entry [\*] upon the roll; for it is not entered till the vacation. R. 1 Rol. 750. l. 25. { Vide Arnold v. Sandford, 14 Johns. Rep. 417. }

So, it may be sued, returnable in B. R. of the same term in which judgment was given in C. B. R. 1 Sid. 104.

Though it is tested before judgment given. 1 R 3, 4.

And, for error in process, which *coram vobis*, &c. it must be sued the same term in which judgment was given. Per Williams, Yel. 157.

Although error should be sued within 20 years after the judgment yet the court will not quash it, if brought 29 years after, because it would deprive him of replying the exceptions in the statute. Str. 827.

{ Where a writ of error was brought on a bill of exceptions, the judgment reversed, and a *venire de novo* awarded, and on a new trial, a second bill of exceptions was taken to the same point, a second writ of error, on motion was quashed. Hartshorne v. Sleght, 3 Johns. Rep. 554. }

### (3 B 9.) By whom it shall be sued.—By or against whom execution shall be.

All parties against whom judgment is given ought regularly to join in error. R. 3 Mod. 134. Carth 7. 2 Mod. Ca. 305. { Vide Phelps v. Ellis-

worth, 3 Day, 144. Callaghan v. Carr, 1 Marsh. 22. } Vide Execution, (E—F).

Though some get nothing by the reversal, they must join for conformity. 1 Rol. 747. l. 35.

As a bishop, in *quare impedit*, who claims nothing but as ordinary. R. 3 Leo. 176. Cro. El. 65.

One defendant alone cannot (without summons and severance) bring error on a judgment against several. 3 Burr. 1789. < Vide Bradshaw v. Callaghan, 8 Johns. Rep. 435. 2d. edit. Gallagher v. Jackson, 1 Serg. & Rawle, 492. >

If judgment is against two, and one only brings error, it is bad, even though the other is dead, if it does not appear; but if it appears any where that the other defendant is dead, the survivor may bring error without being executor of the deceased. Str. 233. < Vide Andrews v. Bosworth, 3 Mass. Rep. 223. >

If on a judgment against two, one alone brings error, the opposite party should move to quash it, otherwise it will stand good. 2 T. R. 737.

If judgment is against two, writ of error *ad grave damnum* of one only will not lie. Str. 606. 2 Ld. Raym. 1403. B. R. H. 135.

The writ of error must describe the suit by the names of all the parties, though *ad grave damnum* of those only who bring error. Str. 682.

If indictment sets forth that the inhabitants of such part of three parishes as the way lies through are bound to repair, and writ of error is of a judgment against the inhabitants in general, *ad grave damnum* of them, it shall be quashed. Str. 1110.

So, all executors against whom the judgment was, though one only appeared. R. 1 Sal. 312.

If in action against three executors one pleads *plene administravit* generally, and there is judgment against him *de assets in futuro*; and the other two plead judgments and *plene administravit ultra*, and a verdict against them; they must all three join in error, all being equally aggrieved by the judgment so far as it affects the assets. Wils. 88. 4 F. 108.

If several executors are sued, though they sever in pleading, and distinct judgments are given against all against whom any judgment is given, all against whom any judgment is given must join in a writ of error: each cannot sue a separate writ upon the judgment against himself. 4 F. 108.

Thus where an action was brought against three executors, one of whom pleaded *plene administravit*, and the other two outstanding judgments, and the plaintiff took judgment of *assets in futuro* against the former, and falsified the judgments pleaded by the other two, upon which he had a verdict and judgment against them; upon which they alone brought a writ of error, the court [\*] held the defendant against whom the judgment of *assets in futuro* was entered, ought to have joined and quashed the writ. 4 F. 108. P. C.

But in an action against several executors, if judgment is given for any one of them, he need not join in a writ of error upon a judgment against all or any of the rest. D. 4 F. 110.

Thus where four executors were sued, each of whom pleaded *plene administravit*, and the jury found for two and against two: the court held the two for whom the jury had found, had no occasion to join in a writ of error with the other two. 1 Roll. Abr. 929. pl. 4.

A *feme covert* alone may bring a writ of error upon a judgment against her, though she was under coverture when the action commenced, and purposes assigning her coverture for error, she being the only person who appears by the record aggrieved by the judgment. R. 4 F. 110.

Or her husband might join her in such writ. D. 4 F. 110.

But if one makes default, he may be severed. Mod. Ca. 40.

If two executors join in a writ of error, and one of them will not assign errors, the court will give the other time to summon and sever. Str. 783.

[\*446]



And a party may have error, though he was not an original party : as tenant by voucher or receipt. 1 Rol. 747. l. 38.

{ Whether the landlord of a defendant in ejectment, who has taken the defence of the suit, but is not a party to the record, can sue out a writ of error. *Quere?* Van Horn v. Frick, 3 Serg. & Rawle, 278.

None but parties and privies can maintain error ; and who are privies. Barr v. Stevens, 1 Bibb, 292. }

So, error may be by him who is privy : as, by the heir. F. N. B. 21. N.

And he need not say, how heir. R. 2 Cro. 160.

By an executor, or administrator. F. N. B. 21. N.

So, error upon an attainder for treason or felony may be brought by an executor, as well as by an heir. R. Sho. 13. 1 Sal, 295. R. 1 Leo. 325.

So, by a privy in estate : as, by him in reversion or remainder after a term for life or years, when the term is determined. 1 Rol. 748. l. 7. Dy. 16.

And by the st. 9 R. 2. 3. while the estate for life or years continues. 3 Co. 4. a.

So, by him in reversion after an estate tail, after the entail is determined, R. 3 Co. 4. a. 1 Rol. 747. l. 8.

Though it be upon a fine by tenant in tail ; for thereby the remainder was discontinued. R. 2 Jon. 182. Ray. 461. Vide Fine, (H 4.)

Tenant in remainder may bring error against a common recovery where the tenant in tail, vouchee, died before the judgment ; and he need not set out a complete title, but only shew the connection and privy between him and the person against whom the recovery was had. 1 B. M. 410.

But it must be by such privy as has benefit by the reversal ; as, error upon a judgment against a tenant to him and his heirs females shall be by the daughter, who is heir to the special tail. 1 Rol. 747. l. 30. Dy. 90. a. F. N. B. 21. M.

Upon a judgment for land of the nature of borough English, it shall be by the youngest son. F. N. B. 21. L.

It must be by him in the immediate remainder. R. 5 Mod. 396.

And if the remainder was not executed, the plaintiff in error ought to make himself heir to him who had in him the estate executed. Dy. 90. a.

If an annuity in fee be recovered against the heir upon the grant of his ancestor, the administrator of the heir shall not have error. 1 Rol. 749. l. 35.

[\*]And a man, who is neither party nor privy, shall not have error. 1 Rol. 747. l. 33. { Vide Hylton's Les. v. Brown, MS. Rep. Whart. Dig. 195. }

As, if money is taken in the hands of B. by foreign attachment, B. shall not have error to reverse the judgment. 1 Rol. 747. l. 50.

If the tenant alien *pendente lite*, the alienee shall not have error. 1 Rol. 748. l. 41.

Nor, an alienee of lands after a statute or recognizance acknowledged. Semb. 1 Rol. 748. l. 15. Cont. F. N. B. 22. B.

Nor, bail of a judgment against the principal. R. 1 Rol. 749. l. 5. 20. Cro. Car. 300. Per two J. Cro. Car. 481. R. Hob. 72. Cro. 384. R. Cro. Car. 561. R. 1 Lev. 137.

Though joined with the principal. R. Cro. Car. 408. 575. 1 Lev. 137. R. Godb. 440.

So, a stranger cannot assign error in arrest of judgment upon an indictment. 1 Sal. 60.

So, if there are five defendants, and three are acquitted, error must be by the other two only. R. 2 Cro. 138.

So, a reversal by him who ought not to have error, may be reversed. R. 5 Mod. 396. R. 2 Cro. 138.

It cannot be taken out in the name of the casual ejector. 2 B. M. 756. Barnes; 179.

And it will be a contempt in an attorney to attempt it. 1 F. 52.

Executors against whom a *scire facias* is sued out to recover damages, assigned on an interlocutory judgment against their testator before his death, cannot bring error, if the testator's attorney agreed for him that no writ of error should be brought in that action; and the court will on motion order the attorney to *non-pros.* the writ. 1 T. R. 388.

< An administrator *de bonis non*, cannot bring error to reverse a judgment recovered by the original executor, because between them there is no privity. Grout v. Chamberlin, 4 Mass. Rep. 611. >

### (3 B 10.) Against whom it shall be sued.

Error ought to be sued against all the parties to the recovery. { Vide Porter v. Rummary, 10 Mass. Rep. 64. Glover v. Heath, 3 Mass. Rep. 252. }

So, against any who was party or privy to the judgment.

And if any who was party has now nothing, yet he shall be named a defendant in error. F. N. B. 18. l.

So, in error of a judgment, which concerns land, there shall be a *scire facias* to the tertenant before he can be ousted. Dy. 321. Ray. 17.

And this usually issues before the *scire facias ad audiend. error.* Dy. 321.

And it is now the course of the court to have a *scire facias* against the heir and tertenants. R. 3 Mod. 274.

Though the heir is within age. Ibid.

So, in error upon a fine and common recovery. R. Carth. 112. Skin. 273.

So, in error upon a judgment for the king in an action by *qui tam*, &c. there shall be a *scire facias* against the informer. Sav. 10.

¶ In error to reverse a common recovery (for the death of the vouchee before judgment), *scire facias*, or any warning to the heir, is not necessary. 1 B. M. 410.

### (3 B 11.) The manner of suing error.

To obtain a writ of error, the attorney from the dogget of the prothonotary finds the number of the roll, and thereby finds the roll [\*] in the treasury, of which he takes a copy, and thereupon the cursitor makes out a writ of error. Vide Comp. Att. 63.

Several writs of error may be sued at the same time; as, one by the tenant, another by the vouchee. F. N. B. 21. M.

And it shall be sued *ex officio*, though it be against the king, without petition. 1 Sal. 264. Cont. 1 Ver. 170. 175.

Since a judgment has relation to the first day of term, a writ of error may be returnable in the same term, before it is actually signed. 1 N. R. 298.

When the writ of error is made out, it shall be entered on the remembrance of the clerk of the errors, who takes a note for bail, if bail is required. (Com. Att. 63.)

And then the party and his bail enter into a recognizance before the chief justice who subscribes it. (Com. Att. 64.)

But proceedings shall not be stayed on application in B. R. because the chief justice of C. B. has not subscribed the return. Str. 1063. B. R. H. 844.

In what cases bail is required, and in what manner it shall be given, vide post, (3 B 12.)—Vide Bail, (G 2.)—Costs, (B).

Service of the allowance of the writ may be before the plaintiff is entitled to sign final judgment. 2 B. & P. 137. < Vide Richardson v. Backus, 1 Johns. Rep. 493. >

The return to the writ may be made within the time given by the rule to certify. 2 T. R. 17.

If the record is brought in in vacation time, it remains as a transcript of the preceding. 2 T. R. 17.

On a writ of error, the court can look to that return only which has been made pursuant to the exigency of the writ. 1 M. & S. 183.

If error is brought in criminal cases, it must be allowed by the attorney-general, for it is *ex gratia*, and the Chancery will not direct it. Eq. Ca. Ab. 414.

{ But in civil cases, it must be granted as a matter of right ; and chancery has no power to supersede it, in such cases nor in criminal cases not capital ; and the question whether it was properly granted, or not, must be decided by the court to which it is returnable. Yates v. The People, 6 Johns. Rep. 337. Vide Shipwith v. Hill, 2 Mass. Rep. 36. Per SEDGWICK J. Pembroke v. Adington, 2 Mass. Rep. 142. Miles v. Rempubliam, 4 Yeates, 319. }

But if it is real error, and the attorney-general refuses, there may be a petition to the king. Ibid.

If error is brought in parliament, it shall not be allowed without the king's warrant, for which five pounds are paid, and four pounds for the writ. Vide Intr. 5. Per Cook C. J. Godb. 247. Vide Parliament, (L 2.)

So, error upon an attainder by indictment shall not be allowed without a petition to the king. Per two J. 1 Rol. 175.

So, in every case where the king is party, and the error is in the substance of the judgment, and not in process or a collateral matter. Sav. 131.

But the defendant shall not be discharged out of custody upon bail, upon a writ of error in parliament. 1 H. 7. 20. a.

If error be of a fine, &c. in a county palatine : though it be returnable in B. R., yet the court there may after reading the writ, without *scire facias* to the defendant, or with it, reform manifest error. Dy. 231. a.

And if the first judgment be reversed upon a special writ of error, both judgments may be examined in B. R. Ibid.

If error be upon an indictment, the proper course is to remove it by *certiorari*, then to have error, which *coram nobis*, &c. and thereupon the defendant in error gives a rule to assign errors. 1 Sal. 266.

And if, upon such rule, the plaintiff does not assign errors, the defendant may move for a peremptory rule ; and then, if he does not [\*]assign, he shall be nonsuited, and the defendant may take out execution. Ibid.

The process in error shall be *alias* and *pluries*, and if the record is not then removed, an attachment. F. N. B. 22. G.

The *pluries* may be returnable in the same court with the writ of error, or in Chancery. Ibid.

If it is returnable in Chancery, and thereupon the record certified there, the chancellor with his own hand may bring it to the court where error was brought, without a writ of *mittimus*. Ibid.

The court will not *non pros.* a writ of error brought contrary to plaintiff's undertaking, if it appears the judgment and undertaking were during his minority. B. R. H. 104.

If a writ of error returnable in Exchequer-chamber abates by defendant's death, the new writ cannot be to the Exchequer-chamber, for only transcript of record is there, the record is in the Exchequer; the court will make a rule for *remittitur* to be entered on the record, with a suggestion of the death. 2 Ves. 238. Parker, 112.

B. R. will oblige plaintiff in error in parliament upon a judgment in ejectment to enter into a rule not to commit waste or destruction pending the writ. 3 B. M. 1823.

Error is lost, if not returnable before death of chief justice; but execution may not be taken without leave of the court. Barnes, 201.

### (3 B 12.) When it shall be a *supersedeas*, and of staying proceedings pending.

A writ of error being allowed, (and bail given when bail is required,) it shall be a *supersedeas* of any subsequent execution. 1 Sal. 321. 1 Vent. 31. 1 East, 662. 2 East, 439. { Vide Blanchard v. Myers, 9 Johns. Rep. 66. Kinnie v. Whitford, 17 Johns. Rep. 34.

But where execution is begun, a writ of error is not a *supersedeas*. Blanchard v. Myers, and Kinnie v. Whitford, *ut supra*. Slusser v. Chapline, 4 Har. & M'Hen. 221.

A second writ of error is no *supersedeas* to a *ca. sa.*, where the first writ is dismissed by *non pros*. Dyer v. Beatty, 3 Har. & M'Hen. 219. Vide Whetcroft v. Dorsey, 1 Har. & Johns. 482. }

Where bail is required, it must be put in within four days after final judgment signed, without reference to the time of the allowance or the service of the copy of it. 1 T. R. 279.

Those four days are exclusive. 4 T. R. 121.

And thereupon a *supersedeas* may be sued out and filed with the sheriff, &c. F. N. B. 239.

Allowance of a writ of error, on a judgment by *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, and all proceedings grounded thereon against the bail, that all may be set aside on motion. 2 Bl. 1183. Vide Barnes, 205. 209. 376. 1 T. R. 379.

But it is not of course to stay proceedings in an action on a judgment pending a writ of error thereon; the court therefore, will exercise their discretion on each application; and if it appears that the writ is sued for delay, the application will be refused. 2 T. R. 78.

And an application to stay an action on a judgment pending error thereon, cannot be made until bail are perfected. 6 T. R. 455.

Where an action is brought in the K. B. on a judgment of the C. B. the court will stay proceedings therein, pending a writ of error only, on the terms of the defendant giving judgment in the second action. *Secus*, where the judgment is of the K. B.; because a second action there is a vexatious proceeding. And in the latter case, if the plaintiff dies before affirmance, judgment cannot be entered *nunc pro tunc*. 1 T. R. 637.

The practice of refusing to stay proceedings pending a writ of error, is confined to cases where the party himself, his attorney or bail, declare that it is brought only for delay; therefore, it does not extend to a writ of error on a [\*] judgment of nonsuit. 5 T. R. 669. 4 T. R. 436. 5 T. R. 714. 1 H. B. 432.

The court will not infer that a writ of error was sued for delay merely, from a view of the proceedings, without some admission to that effect; not, therefore, from its having been sued out before final judgment. 5 East, 145. 1 Smith, 336.

Where one of the bail declared that the writ of error was brought for delay, it was held to be no *supersedeas*. 4 T. R. 436.

Where the defendant's attorney expressly declares that the writ of error is for delay; or only uses expressions equivalent thereto; proceeding will not be stayed.

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5 T. R. 714. So, that where the fair inference from the attorney's declaration, is that the writ of error has been brought for delay, it is no stay of proceedings. 2 B. & P. 329.

A declaration by a defendant that he meant to bring error for delay, must, that it may be ground for taking out execution pending error, be made after action brought. The affidavit, too, in support of an application to take out execution, must shew that it was so made, either by an averment to that effect, or by naming the day. 4 M. & S. 331.

Where the threat of bringing error for delay was made six months before the writ of error sued out, the court allowed it to supersede execution. 7 Taunt. 537. 1 Moore, 253.

If a writ of error is brought for delay, execution may be taken out; but it seems that the regular course is to move to quash the writ of error. 2 T. R. 183. When the party must state positively an admission, that it was brought solely for delay. 1 Smith, 335.

If a party has declared that he will bring a writ of error for delay, and afterwards sues one out, whereupon the other party takes out execution, it shall be incumbent on the former, on applying to set the execution aside, to shew a reasonable ground of error to the court, or at least that there is some colour for his writ of error. 2 M. & S. 479.

Proceedings against bail will not be stayed pending a writ of error, when sued for delay. 3 T. R. 79.

Proceedings in an action on a judgment, or against the bail, will be stayed pending a writ of error thereon; unless it be shewn that the writ is merely for delay, as where the defendant or principal had previously declared that he would delay the plaintiff by bringing error, unless he accepted the terms offered. A bare affidavit that it was brought for delay, is not sufficient; nor is the fact, that the defendant's attorney refused to point out in error, on an offer by the plaintiff to relinquish his judgment if he would do so. 3 T. R. 78. Id. 79.

Where the defendant's attorney, both before and after error brought, told the plaintiff that he must delay the payment of the debt and costs as long as he could, as his client was already considerably in arrear to him, the writ of error was held to be no *supersedeas*. 4 T. R. 436.

The defendant's attorney, after judgment against him, proposed to the plaintiff's attorney "to take a cognovit for the debt and costs payable next term, which he offered to sign, observing that by so doing he would save a great expense to the parties, as he, the defendant's attorney, should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested under the cognovit proposed, for that he must obtain time." Held, that the plaintiff having declined acceding to these terms, might consider a writ of error brought for the mere purpose of delay. 2 M. & S. 474.

A party applied for time, and upon the other side refusing to give it, said, "then I must bring a writ of error." Held, that such writ might be considered as brought merely for delay. 2 M. & S. 475.

[\*]The defendant, on being served with process, informed the plaintiff's attorney, that "he could not pay; that it was useless to go on with the action, as he would delay it all he could, and when the plaintiff had obtained judgment he would bring a writ of error, and put it off all in his power." After judgment and execution, the defendant requested the plaintiff's attorney to keep the execution a secret, as it might injure his credit, acknowledged that he had shewn him lenity, and requested that he might be allowed to pay the money to the officer by instalments. Held, that the necessary inference from the acknowledgment was, that the defendant considered the proceeding just; and, therefore, that a writ of error allowed between judgment and execution, was brought merely for delay. 2 M. & S. 476.

The not arguing a writ of error in the Exchequer-chamber, is not proof that it was brought for delay; therefore, error brought afterwards in parliament stays proceedings. 6 T. R. 400.



A confession that a writ of error is brought for delay, sworn to have been made by "a gentleman who attended the taxation of costs for the defendant's attorney, on the behalf of the defendant," is not sufficient to warrant the issuing of execution pending error. 2 Smith, 60.

Saying that the debt would be settled, and that time was all that was wanted, is not an admission that error is brought for delay. 1 N. R. 307.

Though a writ of error *coram vobis* is not in itself a *supersedeas*, yet execution cannot be taken out whilst it is pending, without leave of the court. 8 East, 412.

A writ of error operates as a stay of execution, as well in an action on the judgment as in the original action. 3 T. R. 643.

The court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action. Barnes, 202. Sir G. Co. 129. S. C. Willes, 183. Sir G. Co. 159. S. C. Willes, 184. Barnes, 203. S. C.

So, error with notice thereof, shall be a *supersedeas* before the writ allowed. 1 Sal. 321. 2 Mod. Ca. 130.

It is a *supersedeas*, though sued out before judgment. Str. 631.

But it can have no effect till the judgment is actually signed. 1 T. R. 279.

A writ of error sued out the same term as judgment signed, operates as a stay of execution, though returnable before the judgment was signed, since, when signed, it has relation to the first day of term. 5 East, 145.

A writ of error (thus on a judgment by *nil dicit*, 2 Blk. 1183,) is a suspension of all further proceedings from the time of allowance; therefore, a *scire facias* against the bail sued afterwards is irregular. 1 East, 662.

The bail of a member of parliament, under st. 4 Geo. 3. c. 33., cannot be sued pending error on the judgment against their principal. 2 H. B. 372.

A writ of error allowed before the return-day of a *ca. sa.* taken out to charge the bail, is a *supersedeas*; so that the bail cannot afterwards be proceeded against though the *ca. sa.* had laid four days in the office before the allowance. 3 T. R. 390.

A writ of error is allowed two days after the return of the *ca. sa.* The bail may be sued during the writ of error, which is no *supersedeas*. 1 Anst. 176.

The court will stay proceedings against bail, until the writ of error brought in the original action be determined, though the application be not made within the four days allowed to the bail to supersede the principal. Forrest, 25.

[\*] Where a writ of error is sued out on the last day allowed for surrendering the principal, the bail, on an application to stay proceedings against them, because the writ was sued out *sedente curia*, and therefore within the allowed time, must shew that fact. 2 East, 546.

Where error is brought after the bail are fixed, proceedings by *si. fa.* against them will be stayed pending error, only on their undertaking to pay the condemnation money, and costs, of the *si. fa.*; and where there is no bail in error, the costs of the writ of error, in case of affirmance. 3 East, 546. But on allowance of a writ of error, before the time for surrender is out, the bail may stay proceedings against themselves, on undertaking in the alternative, to pay the sum recovered, or surrender within four days after affirmance, &c. 11 East, 316.

A writ of error is no *supersedeas* in ejectment, where the plaintiff without waiting the tax, and thereby waiving his costs, sues out an *hab. fac. poss.* 4 Taunt. 299.

In error upon a *quare impedit*, there shall be a *non molestand.* to stay execution till errors discussed. Dy. 76. b.

And, if execution be afterwards done, it will be a contempt. R. 2 Bul. 194.

But no contempt is incurred by taking out execution till after notice of writ of error. Barnes, 376.

And the court will not set aside an execution sued out before, but executed after the allowance of a writ of error, served on the sheriff and the party, if the plaintiff

in error has not regularly put in bail; otherwise if bail be put in in time. 2 T. R. 44.

So, if execution be after a writ of error allowed, without notice of it, restitution shall be granted. R. 3 Lev. 312. 1 Sal. 321, 322.

A writ of error is no *supersedeas* till allowance or notice of it. Willes, 271. Barnes, 265. S. C.

And if the sheriff has levied under a *fi. fa.* after the issuing, but before the allowance of a writ of error, he must proceed to sell the goods. Ibid.

A writ of error operates as a *supersedeas* from the time of the allowance, not from the time of service. 1 Bos. & Pul. 470. 2 Bos. & Pul. 370, S. P.

Bail, therefore, must be put in within four days of the former period. Ibid.

If the writ of error be allowed before judgment, the time of putting in bail rises from the judgment, if after judgment, from the time of the allowance. Per Buller, J. *ibid.*

Allowance of a writ of error may be served before the plaintiff is entitled to final judgment. 2 Bos. & Pul. 137.

A writ of error on which bail is regularly put in, operates as a stay of execution taken out before it was allowed. *Secus*, if not duly followed up by bail. 2 T. R. 44.

The allowance of a writ of error is itself a *supersedeas*. The use of serving the allowance is, that the party may be in contempt, if he sues out execution afterwards. 1 T. R. 279. 1 B. & P. 478. 2 B. & P. 370. And so completely is it a *supersedeas*, that it avoids any further proceeding, without an express notice to the plaintiff below not to proceed. 5 Taunt. 204. So that even a return of *non est inventus* by the sheriff after an allowance to a *ca. ad. sa.* issued before, is a nullity; and by consequence so are subsequent proceedings thereon by *sa. fa.* against the bail. 2 East, 439. Final judgment, however, may be signed after a writ of error has been taken out, and allowance served, where the allowance is not served till the writ is spent. 3 Taunt. 384.

[\*] Though the writ of error was not allowed till 24 Oct. and the writ of execution was tested the 23d, for of course judgment is not signed till four days after the beginning of the term, which was the 27th Oct. 3 Lev. 312.

If plaintiff defers signing judgment till error spent, and then brings debt on judgment, the court will order new writ of error at attorney's expense. Barnes, 250. Vid. 1 T. R. 279. acc.

Execution after error allowed, and bail, is irregular, though the writ of error was returnable before judgment signed, if it was signed the same term, even though error returnable the *essoin-day*: not if signed in a subsequent term. Barnes, 197, 198. 260.

If there is verdict against four defendants, and judgment by default against a fifth, who brings error, without bail, court will give leave to take execution against the four. Barnes, 202.

A certificate from clerk of errors that bail is not put in, is not necessary before taking out execution. Barnes, 212.

And a writ of error shall be a *supersedeas*, though it be of a judgment in a former writ of error, in which a *supersedeas* was granted. R. per three J. Co. Cont. 2 Cro. 341. Godb. 250.

A second writ of error is no *supersedeas* where the first became ineffectual, through the plaintiff in error. 8 East, 412.

Though the record is not removed, but only a transcript to the court where error is brought. R. 2 Cro. 535.

Though no notice of the writ allowed. R. 2 Mod. Ca. 373.

Semble, that a writ of error from C. B. to K. B. in which the record is improperly described, is no *supersedeas*. 5 Taunt. 82.

The court will not set aside a writ of execution issued after allowance of a writ of error served on the plaintiff, if the writ of error described the person suing as the king's debtor, when in fact he had proceeded on a *capias* of privilege. 1 Price, 312.

So, if judgment is affirmed, the *supersedeas* continues till the record is sent back.

If error is discontinued by the not coming of the justices. R. 6 H. 7. 15. b.

So, if the plaintiff in error is nonsuited, or discontinues, or error abates. R. Sho. 404. 1 Sal. 261.

But if the execution is executed before error allowed, or notice, there shall be no restitution. 1 Sal. 321. Mod. Ca. 130.

Though it was returned or filed after error notified. Mod. Ca. 130.

And if it is levied in part, such part may afterwards be applied to the debt. R. Yel. 6.

For the sheriff may return the goods, and afterwards upon a *venditioni exponas* sell them. Ibid. Vide Execution, (C 6. 8.)

But without a *venditioni exponas* the sale will be void. R. 1 Rol. 894. l. 10.

If defendant is taken in *ca. sa.* and bail in error is afterwards perfected, he shall be discharged; but on a *fi. fa.* the proceedings, so far as sheriff has gone, must stand. Barnes, 212.

The same persons who were bail in this court may justify again as bail upon writ of error returnable in parliament. 8 T. R. 639.

So, if a writ of error abates, a new writ of error in the same court is no *supersedeas*. R. 1 Mod. 285.

Nor, error in parliament, and errors assigned, if the parliament be dissolved. R. Ray. 5.

[\*]So, if error is in parliament, and it abates by prorogation, though there is no default of the party, yet a new writ of error, returnable at the next sessions of parliament, is no *supersedeas*. R. 1 Vent. 31. 1 Sid. 412. 2 Lev. 93.

So, where the first writ of error is returnable at the next sessions of parliament, it is no *supersedeas* in respect of the distance of the return. R. 1 Vent. 266.

Where a term intervenes. Semb. 3 Mod. 125. 2 Leo. 120.

Writ of error in parliament is no *supersedeas*, if it be not transcribed in fourteen days, and the parliament be dissolved. Bunb. 64.

If error is brought in parliament, though the house is prorogued, and the record has not been transcribed, the court will not on motion grant leave to take out execution. Bunb. 131.

So, if a writ of error is returnable in B. R. or Exchequer, after the next term. 1 Vent. 266.

Or, on the last return of the next term, for it seems an affected delay. Semb. 1 Sid. 45. 454. 1 Vent. 266.

So, if judgment is affirmed in the Exchequer-chamber, and after a *scire facias* thereupon, a *quare execution. non*, &c. is brought, and execution is awarded, and then a writ of error is brought thereon, it shall not be a *supersedeas*. R. 5 Mod. 230.

After affirmance, error *coram vobis* without leave is no *supersedeas*, for it cannot be allowed without leave. Str. 949.

So, if after error the record is not removed, for a delay appears. Pr. Reg. 210.

And the plaintiff may have a writ *de executione judicii*. Mod. Ca. 220.

So, if by a defect in the writ of error, the record is not removed, execution may be taken out without motion. 1 Sal. 265.

Otherwise, if the writ of error abates. Ibid.

If error abates by the act of plaintiff, (as if *jeme-sole* marries,) execution shall go. Str. 880. 1015.

So, by the st. 3 Jac. 8. error is no *supersedeas*, upon a judgment in debt [\*454]

for money only, or rent or any contract, if the plaintiff does not find bail, &c. as, in debt, covenant, &c. for non-payment of rent, &c. Sho. 14. 2 Keb. 131. Vide Bail, (G 2.)

But the st. 3 Jac. 8. does not extend where error was before the statute, and discontinued by the not coming of the justices, and then another writ is brought after the statute. R. 2 Cro. 135.

Nor, by the st. 13 Car. 2. 2. on judgment after verdict in debt for not setting out tithes; in an action upon the case upon a promise for payment of money, trover, covenant, detinue, or trespass.

Nor, by the st. 16 & 17 Car. 2. 8. on judgment after a verdict in any personal action, or in ejectment or dower.

So, it is no *supersedeas*, if bail is not found pursuant to the st. 3. Jac. where error is upon a judgment in debt upon a bond for payment of so much money as A. shall declare due upon account between them. R. per three J. 1 Lev. 117.

So, error in parliament is no *supersedeas*, if a new recognizance is not given by bail, where there was bail upon error before brought in the same cause in B. R., for such bail is not liable to the costs in parliament. R. 1 Sal. 97. R. 2 Mod. Ca. 79. Str. 527.

[\*]But bail is sufficient though the defendant himself did not give his recognizance. R. Carth. 121. 2 Bos. & Pull. 443. Barnes, 75. 78. S. P.

So, there may be exception to the bail, without notice, but they cannot take out execution without a rule of four days for other bail. 1 Sal. 98.

But by the st. 13 Car. 2. and 16 & 17 Car. 2. those clauses do not extend to error by an executor or administrator, nor are they within the st. 3 Jac. 8. if error is brought by them upon a judgment against the testator, or against themselves, as executor or administrator. R. 2 Cro. 350. Cro. Car. 59. Lit. 3. 1 Sid. 183. Vide Costs, (B).

Otherwise, if the executor or administrator is chargeable *de bonis propriis*. 2 Cro. 350. R. 1 Sid. 368.

So the st. 3 Jac. 8. does not require bail in error upon a judgment in debt upon a bond for performance of covenants. R. Sho. 15. R. 2 Bul. 54.

Though the breach be for non-payment of rent, &c. Sho. 15. R. 2 Keb. 131. R. Carth. 29.

Nor, in error upon a judgment in debt upon a bond for payment of money at the return of a ship and performance of the articles of a bottomree contract. R. Sho. 14. Dub. Mod. Ca. 38.

Nor, in debt for not performing an award. Sho. 14. R. 2 Bul. 54.

Or, for arrearages of an account. Sho. 15. R. 2 Bul. 54.

Nor, in error upon a judgment in an action upon the case upon a bill of exchange. Sho. 15.

Nor, in debt upon a bond to indemnify. Sho. 14.

Nor, in error brought against an avowant for rent by the plaintiff in replevin; for it is not debt brought by him. R. Hob. 265.

Yet, in error upon a judgment in debt upon a judgment, bail is required by the st. 3 Ja., though the first judgment was in debt for not performing covenants. R. per two J. 1 Lev. 260.

### (3 B 13.) Record how removed.

When error is brought in B. R. of a judgment in C. B. a *mittitur* is wrote upon the roll, and thereupon the record itself (except in the case of a fine) is transmitted to B. R. 1 Rol. 752. l. 45. F. N. B. 20 F. [Cowp. 843.]

And in error of a fine in the hustings of Oxford, the record itself shall be removed. 1 Rol. 753. l. 5.

The whole record shall be removed. (Vide Com. Att. 65.)

If the verdict is quashed for insufficiency in point of law, apparent upon the record, it shall be removed. R. 2 Sand. 254.

But in error of a fine, only the transcript shall be removed; for if it is affirmed, B. R. has no chirographer, nor can hold plea in *quid juris clamat*. D. Dy. 89. b. 1 Rol. 752. l. 50. F. N. B. 20 F. Vide Fine, (H 5. 7.)

Yet B. R. may send for a note of the fine, and reverse it. 1 Rol. 752. l. 55. F. N. B. 20. F.

[\*]Or, command the treasurer and chamberlain to take it off the file. 1 Rol. 753. l. 3.

So, in error in the Exchequer upon a judgment in B. R., only the transcript shall be sent. 2 Cro. 535. [Doug. 352. n.] Vide Courts, (B 1.)

So, in error in parliament upon a judgment there, for the chief justice conveys the roll with the transcript to the house of lords, and leaving the transcript there takes back the roll. 4 Inst. 21. Dy. 375. a. 1 Rol. 753. l. 20. 2 Cro. 341. Godb. 247. [Cowp. 843.] Vide Parliament, (L 2.)

If error in parliament is not transcribed in fourteen days, the defendant in error, on motion, shall be at liberty to take out execution, if it is not transcribed and certified in eight days. Bunb. 69.

But the court will not direct the master to include interest in the costs to be taxed on non-prossing a writ of error, returnable in parliament for want of transcribing. 2 T. R. 58.

So, in error in B. R. upon judgment in Ireland, only the transcript was removed, because of the danger of the seas. 2 Cro. 535. Yel. 118. Godb. 247. 2 Bul. 162, 163. 2 Rol. 126. 274. [Cowp. 843.]

If error be in B. R. of a judgment in C. B., though the judgment and the record, on which it is entered, be removed; yet the original shall not be removed. 1 Rol. 753. l. 7.

Nor, in error of a judgment in Ireland. 1 Rol. 753. l. 15.

Nor, is it necessary in error of a judgment in an inferior court. 1 Rol. 753. l. 10.

On a writ of error, C. B. sends up the very record, but B. R. sends only a transcript to the Exchequer-chamber, and therefore the transcript must be brought back to B. R. to be amended by the original record. Str. 837.

But in error upon a judgment in an inferior court upon a *scire facias* against bail, the proceedings in the original action may be returned. R. Ray. 431.

And when, upon error, the original, imparlance, warrant of attorney, or other part of the record is not returned, the plaintiff in error may allege diminution, and have a *certiorari* for the part not returned. 1 Sal. 267.

If exception is taken to the omission of a word in a writ, plaintiff in error must bring it before the court by *certiorari*. B. R. H. 19.

Though it appear on the return to a *certiorari* that no bill was filed in the court of King's Bench against the defendant, (in a suit there by bill,) in the term of which the declaration is intitled, but that a bill was filed against him by the plaintiff in the following vacation, it is not erroneous, if it also appear that the bill was filed of the preceding term. 2 H. Bl. 608.

And diminution may be alleged in error upon a judgment in Wales, in a county palatine, before justices of oyer and terminer, as well as upon a judgment in Westminster-hall. 1 Sid. 40. 139. 147.

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So, if a different original, &c. is returned, the defendant may allege diminution, and return a true original. R. 2 Cro. 130. R. Cro. Car. 91.

So, if want of an original, &c. be assigned for error, the defendant in error may allege diminution, and have a *certiorari*. 1 Sal. 267.

Or, may by rule compel the plaintiff to do it. Ibid.

[\*] But if neither the plaintiff or defendant does it, but pleads *in nullo est erratum*, judgment shall be affirmed. 1 Sal. 267. Sho. 76.

If a *certiorari* is awarded upon diminution alleged, the defendant in error may enter a rule with the secondary for a return of the writ; and if it be not returned at the day, the benefit of it will be lost. Vide Intr. 4. 1 Sal. 267.

But diminution cannot be alleged in error upon a judgment in an inferior court. 1 Sid. 40. R. 1 Sal. 266.

Or, upon a judgment in Ireland. Vide Intr. 4. R. cont. Sho. 214.

Nor, after *in nullo est erratum* pleaded. 1 Sid. 139. Cro. El. 84. R. Mo. 700. 1 Sal. 269. 2 Cro. 141.

The court may take notice that the record is imperfect, and award a *certiorari* for their own satisfaction before errors assigned. Str. 440.

The court may award *certiorari* to bring the original before them *ad informand. conscient. cur.*, though no diminution is alleged. B. R. H. 118.

And after *in nullo*, &c. pleaded, the court, *ad informandum* in matter of fact, and for affirmance of the judgment, may award a *certiorari*. 1 Sal. 269. Sho. 214.

So, in all cases the court may award a *certiorari* for any part of the record not returned, or mistaken: for though the party is estopped by plea of *in nullo est erratum*, the court shall not be. R. 1 Sal. 270.

If an erroneous writ of privilege is assigned for error, it must be brought before the court by *certiorari*; the recital in the declaration is not sufficient. Ld. Raym. 1398.

If to a *certiorari* return is made that there is no such writ remaining in the office, and on a second *certiorari* return is made, that on searching the writs there is such a writ, the second return shall be taken to be true. Ld. Raym. 1476.

A second *certiorari* shall not be granted to reverse a judgment. Str. 765. 819.

After *in nullo est erratum* pleaded and argued, and allowed to be a confession of the errors, the court on affidavit may award *certiorari* for affirmance of judgment. Str. 907.

Errors cannot be verified by a *certiorari* tested before the writ of error. Str. 819. Ld. Raym. 1554.

The return is good, though the name of office is omitted, if it says, as to me within is directed. Str. 695.

If there is a material variance between the writ of entry and the record certified, the record is not removed thereby: as, if it varies in the style of the court. R. 1 Rol. 754. l. 50. R. Sho. 145.

A writ of error to remove a judgment upon a plaint levied before the mayor, aldermen, and sheriffs of a city, will not remove a judgment on a plaint before the mayor and constables of the staple. R. Ld. R. 819.

If it varies in the judges of the court. R. 2 Cro. 254.

Or, says *in curia nostra*, &c. where the judgment was in the time of the predecessor. R. Dy. 105. b. 1 Rol. 754. l. 15. 45. Sho. 186. 3. R. Carth. 158.

So, if it varies in the name of any party, his abode, or addition. 1 Rol. 754. l. 5. R. 1 Sid. 104. 193. R. Dy. 173. b. 1 Sal. 264.

Or, mentions more or fewer parties. R. 1 Rol. 753. l. 45. R. 1 Sid. 269.

Or, a different sum for damages, &c. 1 Rol. 754. l. 40.

Or, different particulars recovered. 3 Co. 2. a.

[\*]Or, different parishes where the lands lie. 2 Jon. 171.

So, if the writ be directed to A. of a judgment *coram vobis*, and the record is *placita coram B.* and afterwards there is an entry that B. died, and A. was made chief justice. R. Sho. 26.

If error is sued, and the record returned before judgment given. Semb. 1 Lev. 137.

So, if the writ of error mentions a suit by bill, where it was by writ of privilege, or by original. R. Sal. 660.

But if the writ of error does not mention some things so fully as the record, the writ shall not abate for it; as, if it does not mention the party's addition. Per Twisd. 1 Sid. 104. Per two J. Dy. 356. b.

If the writ is *inter A. nuper de Westm. in com. Midd.*, and the record is only *nuper de Westm.*; if Middlesex is in the margin it is well enough. Str. 316.

If it is of a judgment in Wales, or in an inferior court, in a *quod ei de-forceat protestando*, &c. and it omits the *protestando*. R. 1 Sid. 139.

If error of a judgment in *quare impedit* says, *quia in recordo et reddit. judicii coram vobis*, &c. where the judgment was before justices of assise. Dy. 77. a.

Or, error is to a sheriff, without naming his name, of a judgment *coram vobis*, where it was before a former sheriff. R. Mod. Ca. 61.

If a writ of error omits the title of the judge, or that the suit was by writ, &c. Dub. Godb. 248.

If a writ of error has a material variance, it abates, and the plaintiff shall have a new writ.

And the plaintiff may, by motion, quash his own writ for expedition. (Vide 5 Mod. 67.)

A writ of error from K. B. to the Exchequer-chamber cannot be quashed in K. B. Dougl. 350. Nor in Chancery. Id. 353.

So, if the plaintiff does not assign errors, and take out a *scire facias* in the term, when the record is removed, it is a discontinuance. Vide post, (3 B 14.)

So, if the plaintiff or defendant in error dies, the writ abates. Vide Abatement, (H 33.)

So, the writ abates, if it does not mention the assise to be *capt. &c. et post adjorn.*, though the record is removed by it. R. Yel. 5.

But the plaintiff cannot quash his writ of error upon a foreign suggestion: as, for want of all the parties, &c. 5 Mod. 67.

If error abates, or is discontinued, after the record itself is removed, there shall be a new writ *quæ coram vobis residet*. R. 1 Rol. 753. l. 40. R. Yel. 6.

As, if the judgment be against two, and a writ of error be brought *ad damnum* of one, and be abated for that variance, then *coram vobis* is the only proper writ. 2 Ld. Raym. 1408. Str. 606.

So, if error is brought for error in fact, &c. upon a judgment in the same court. Vide ante, (3 B 1.)

So, if a writ of error is quashed, where the writ was by one, when all the defendants ought to have joined. R. 2 Mod. Ca. 317. 381.

But if the record is not removed, there shall not be a new writ *quæ coram vobis*, &c.: as, if a writ of error is brought before judgment given. R. 1 Rol. 754. l. 20. Vide ante, (3 B 7.)

[\*]So, if a writ of error is quashed for a material variance. Yel. 6. Vide supra.

[\*458] [\*459]

So, if only the transcript of the record was removed. R. 1 Rol. 755. l. 10. D. 3 Co. 15. b. Vide supra.

Yet, if error of a judgment in Ireland abates, there shall be a new writ *quæ coram vobis*, though only the transcript was removed. R. 1 Rol. 755. l. 5.

Defendant cannot have leave to transcribe the record (though plaintiff has not done it) to *non-pros.* the writ, and have the benefit of the recognizance. Wils. 35.

Rule to transcribe may be served on plaintiff himself. Barnes, 410.

A *non-pros.* signed for want of transcribing the record, shall be set aside, if final judgment is not entered. Barnes, 195.

(3 B 14.) Assignment of errors, Tidd. 1136. & post.—When it shall be.

When the record is removed, the plaintiff in the same term ought to assign his errors. F. N. B. 20 G. Lut. 354.

And after errors assigned, he shall have a *scire facias ad audiendum errores*, returnable in the same or in the next term. F. N. B. 20 G.

And if he does not assign errors, and take out a *scire facias* in the same term, the writ of error is discontinued, and the plaintiff put to a new writ. F. N. B. 20 G.

{ The plaintiff in error, may proceed by *scire facias ad audiendum errores* or by a rule to join in error; and if the defendant does not appear, judgment will be reversed, of course. Sheldon v. M'Evers, 1 Johns. Cas. 169.

Where the record is made up, a general assignment of errors on a bill of exceptions, is sufficient. Shepard v. Merrill, 13 Johns. Rep. 475. }

Or, the defendant may have a *scire facias quare executionem non*, &c. and upon two *nihils* and judgment thereon, he shall have execution, though error is afterwards assigned. Carth. 41.

If, after a writ of error allowed, defendant in error become bankrupt, his assignees cannot sue out a *sci. fa. quare*, &c. in their own names; but they must go on with the writ of error in the bankrupt's name till judgment. 1 T. R. 463.

But, if plaintiff in error is dilatory, defendant must give a rule to transcribe; and if he will not, defendant may *non pros.* writ of error. B. R. H. 351.

For there can be no *sci. fa. quare execut. non* till the transcript of the record below is returned. Semb. *ibid.*

The *scire facias quare executionem non* may be sued out immediately on the record being certified, though it be certified before the expiration of the time given by the rule for that purpose. 2 T. R. 17.

The *scire facias quare executionem non* may be sued out on expiration of the rule to certify the record, though the transcript has not then been actually delivered and filed. 15 East, 646.

A *scire facias* in error need not lie four days in the office, before the return. 3 Burr. 1723. 4 Burr. 2439.

So, if the plaintiff does not appear at the return of the writ of error, or assigns errors insufficiently, being his own default, the defendant may take out execution. Yel. 7.

So, if one plaintiff assigns error, he must do it in the name of all, except where the others are severed. Mod. Ca. 40.

So, errors must be assigned in term, and not in vacation; for the court cannot then take notice of them, though they are material. (Vide Pr. Reg. 203.)

So, they must be assigned upon the record. (Vide Pr. Reg. 196.)

[\*]So, if upon rule given, the plaintiff in error in B. R. does not assign errors and certify the record within eight days, he will be nonsuited.

In error in an action by original, the rule to appear cannot be given before the

*quarto die post* of the return-day of the second *scire facias* (the first having been returned *nihil.*) 13 East, 391.

Writ of error cannot be *non-prossed* without a rule to assign errors. 3 B. M. 1772.

If the attorney for the plaintiff in error from Ireland cannot be found, the court will make a rule, that if errors are not assigned within a certain time after notice is fixed up in the office, the defendant in error may sign a *non-pros.* Str. 417.

If neither plaintiff in error, nor his attorney, can be found, the court will order that rule to assign errors fixed up in King's Bench office shall be good notice. B. R. H. 130.

The plaintiff in error in the House of Lords, may *non-pros.* his writ without carrying up the transcript, and *semble*, in the Exchequer-chamber likewise. 1 M. & S. 104.

So, if the defendant takes out a *scire facias quare execution. non,* &c. after *scire feci* returned, the plaintiff at the day of return may assign errors. Dy. 77. a.

{ The infancy of the defendant, is well assigned as error, by averring him to be an infant at the time of appearance and plea pleaded, and not at the time of the rendition of judgment. Arnold v. Sandford, 14 Johns. Rep. 417. }

### (3 B 15.) How it shall be.

The plaintiff may assign for error, an error in fact, or errors in law. F. N. B. 20. E.

On error in fact assigned, plaintiff may conclude with an averment; for defendant may put it in issue, if he pleases. 1 B. M. 410.

But he cannot assign both; for this will be double. R. 1 Rol. 761. l. 35. D. 1 Sid. 147. 1 Lev. 76. 105.

As error in fact and in law cannot be both assigned on one writ; so, after affirmance on error in law assigned, error *coram vobis*, and error in fact assigned, shall not be allowed. Str. 975.

Nor, can he assign several errors in fact. F. N. B. 20 E.

Yet he may assign several errors in law, and it will not be double. Ibid.

Nor, can he assign an error in fact, if it was not assigned before the *scire facias.* Ibid.

So, he cannot assign error in process after *in nullo est erratum* pleaded. R. Cro. El. 83.

Nor, error for want of an original, for the party cannot allege diminution. R. Cro. El. 84.

If plaintiff in error means to take advantage of there being no bail, &c. he must assign it for error, take out *certiorari*, and get it returned. Ld. Raym. 1441.

The plaintiff generally may appear by attorney, and assign his errors.

But if he be in execution, he must assign them in person. F. N. B. 21. A.

Yet the court may give leave to a defendant, in execution, to assign errors by attorney. Str. 443.

Or, the plaintiffs must join in assignment of errors, for an assignment by one is a discontinuance. R. 2 Cro. 94.

Though after a *scire facias ad audiendum errores*, they all join in the re-assignment. Ibid.

[\*] Though it be in a *quare impedit*, where the bishop is only nominal. Ibid.

The plaintiff must put in a bill, containing the several errors assigned. F. N. B. 20. G.

And it shall not be general in *omnibus erratum est*, but it must shew particularly *erratum est in hoc*, &c. Ibid.

[\*461]

Yet general error, that judgment was given for the plaintiff, where it ought to have been for the defendant, is well.

Error may be assigned in every part of the record. 1 Rol. 760. l. 45.

It may be assigned for error, that judgment is given for more than the party appears on the record entitled to recover. R. Ld. R. 547.

Thus, on a *sci. fa.* upon a recognizance, whereby two persons severally bound themselves in the sum of 2000*l.*, a judgment that the plaintiff should have execution against them of the several sums of 2000*l.* and 2000*l.* was held erroneous, but the court thought it amendable as a clerical misprision. Ld. R. 547.

If the assignment of error concludes with an averment, *prout. cur. consid.* it will be well, though it is error in fact. Semb. 2 Lev. 73.

But if error in fact be assigned, notoriously false, the attorney may be fined. Sal. 516.

If error be assigned on a mistake in form, the mistake may be amended in the court below pending the writ of error. Doug. 114.

And this in a penal action. Ibid.

### (§ B 16.) What matters cannot be assigned.

But the plaintiff cannot assign for error a matter contrary to the record, 2 Cro. 28. R. 1 Lev. 76. R. 1 Sal. 262. 1 Lev. 310. 2 Cro. 244. { Wight v. Mott, Kirby, 154. }

Nor, a thing whereof he may have advantage by plea. R. 1 Rol. 762. l. 40.

Though judgment be by default. Dub. 2 Cro. 547.

Or, by complaint to the court of irregularity : as, that the original, &c. was not returned by him, who was sheriff. R. 1 Sal. 265. Ld. R. 884.

Nor, a thing which was his own default; as, a defect in his plea. Mo. 692.

Nor, a thing which tends to his advantage, if it was not by the court's default. R. 5 Co. 39. b. 1 Rol. 760. l. 10. 13. R. 1 Vent. 60. 2 Sand. 42. 45. Vide 8 Co. 59. a.

{ A judgment in debt on a former judgment, cannot be reversed for error in the first judgment. Hawes v. Hathaway, 14 Mass. Rep. 233. }

A defendant cannot assign for error, that the court awarded a *respondeat ouster* only, where final judgment ought to have been given. R. Ld. R. 593.

Or that the court allowed an *essoin*, where it was not allowable. D. Ld. R. 593, 80.

On error on a judgment in ejectment, the death of the nominal plaintiff in the course of the suit cannot be assigned for error : the court will quash the assignment, and make the attorney shew cause why an attachment should not be granted against him. 1 F. 52.

Error assigned, that defendant, an infant, appeared by attorney; plea, that defendant was of full age; demurrer, for that no place shewn where he was of full age. R. venue as to full age, or other personal quality, not necessary; they are triable where action brought. Str. 8.

Error assigned, that A. who, on the first trial, was withdrawn in order for a view, was sworn to the second pannel, not allowed. Str. 70.

[\*] If the description of the judges of assise, A. and B. *just. &c. ad capiend. juxta formam*, &c. omitting the word *assisas*; yet, if it appears in other parts of the record that they were justices of assise, it cannot be assigned for error, for it would be contradicting the record. B. R. H. 166.

Defendant in ejectment cannot assign that, being an infant, he appeared by attorney. Str. 25.

Nor bail, matter which lies properly in the mouth of the principal. Str. 197.

Nor, matter which might have been pleaded to the *scire facias*. Ibid.



That the judgment is entered *quia videbitur* instead of *videtur*, is not error : for *videtur cur.* is no judgment, and is implied in the *ideo consideratum est.* Str. 440.

That A. who was sworn as a juror returned on the principal pannel, was not returned by the sheriff ; for it is contrary to the record. Str. 684. 2 Ld. Raym. 1414.

That there is no *venire* nor *habeas corpora.* Ibid.

That the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. 2 Ld. Raym. 1415.

The want of a writ of inquiry, cannot be assigned for error, it being a judicial writ, and the want of all judicial writs being expressly aided by 18 Eliz. c. 14. R. 1 F. 6. Note.—It was said, that it should be intended that the writ was lost, and that there had not been any. Therefore Qr. the express words of the assignment and the entry of the judgment.

It cannot be assigned for error, that it does not appear before whom a writ of inquiry in the cause was entered ; for if it was executed before a wrong person, the inquisition ought to be brought before the court of error by *certiorari.* R. 1 F. 12.

That the damages and costs given by the court on demurrer are not said to be given *ex assensu* of the plaintiff. Str. 867. Ld. Raym. 1570.

If judgment be entered *ideo cons.* it is an abbreviation of *consideratur*, and as good as *cons. est*, for *consideratum est.* Str. 874.

In *quare impedit* brought by the crown, the original writ was returnable at a general return, the *venire* at a day certain, not error, not discontinuance but miscontinuance, and helped by statute of jeofails, 32 H. 8. which extends to the crown in civil suits. Str. 62.

In error out of B. R. in Ireland, for affirmance of a judgment in C. B. there want of warrants of attorney on the writ of error, assigned, but set aside. Str. 141.

A judgment cannot be reversed by the recital of the writ, but the very process itself shall be brought before the court. Str. 225.

If a peer is put in *misericordia*, &c. generally, it is not error. Ibid.

If the plaintiff is adjudged to be in *misericordia*, instead of the defendant, it is not error. 2 H. Bl. 312.

It is not a cause of error to enter a judgment of *misericordia* in a *qui tam* action for a penalty. 6 T. R. 255.

The death of plaintiff in ejectment. Str. 899.

That a writ of inquiry does not bear *teste* in the name of the person who is chief justice of C. B., for the court will not judicially take notice who are judges of C. B. Str. 1080, Andr. 74, S. C. by the title of Hook v. Ship.

That defendant filed warrant to defend by A. his attorney, and that on the judgment it appears he appeared and defended by B. his attorney ; for it is contrary to the record. Wils. 85.

Plaintiff in error to a *sci. fa. quare execut. non.* may not plead payment. Nor that the damages recovered had been levied. Str. 679. 2 Ld. Raym. 1414.

If issue was joined on such plea, and found for defendant in error, he might take out execution ; but not *non-pros.* the writ of error till after a rule to assign errors. Ibid.

### [\*](3 B 17.) *Scire facias ad audiend. errores.*

If the defendant in error does not appear upon the return of the *scire facias*, another *scire facias* issues.

If he does not appear at the return of the second *scire facias*, the judgment shall be reversed ; for two *nihilis* amount to a garnishment. Vel. 113. Vide post, (3 L 9.)

On *scire feci* returned, if the defendant does not appear and join in error, plaintiff may put it in paper without taking out a rule to join in error. Str. 144.

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*Scire facias* in error need not lie four days in the office before the return, though *scire facias* against bail must. 3 B. M. 1723. 4 B. M. 2439.

If the defendant appears, the plaintiff must assign his errors, or by rule with the clerk shall have day for it till another term. Yel. 7.

And if he does not, the defendant may have a *scire facias quare executio non*, &c. and if the sheriff returns *nihil habet*, a second *scire facias* having fifteen days between the *teste* and return. Cro. El. 706.

If the sheriff returns *scire feci*, or otherwise, at the return of the second *scire facias*, the defendant may give a rule to assign his errors; and if the plaintiff does not assign them, the judgment shall be affirmed. Vide Intr. 4. 2 Leo. 107.

There must be a rule on the *scire facias quare executio*, &c. before there can be a rule to assign errors. Str. 917.

If the defendant in error from C. B. into B. R. give an eight day rule to certify the record, the record may be certified in less time, though the rule expire in vacation; and a *scire facias quare executionem non* having been issued immediately upon the record being certified, returnable the first day of the following term, the defendant may serve the plaintiff in error on that day, with a rule to appear to the *scire facias*, and a rule to assign errors. 2 T. R. 17.

The rule to assign errors cannot be given before the expiration of the rule to appear. 6 T. R. 367. over-ruling 2 T. R. 17.

Where a plaintiff brings error to reverse his own judgment, and will not proceed, the court will rule him to assign errors within a limited time. 3 Burr. 1772. 6 T. R. 367. over-ruling 2 T. R. 17.

If there are two defendants in error, and one only prays *scire facias quare*, &c. and plaintiff comes in and assigns his error, it is not error though possibly he might have moved to quash it, but he has waived his objection. 3 B. M. 1739.

If original plaintiff dies pending error, his executor may have *scire facias quare*, &c. out of C. B. before record transcribed; after, out of B. R., and plaintiff in error may have *scire facias ad audiend.* out of B. R. against executor. Barnes, 432.

If upon the return of a *scire facias* plaintiff assigns his errors, all further proceedings shall be staid upon it; but where he stands out upon pleadings to the *sci. fa.* execution shall go, if it be adjudged against him. Str. 390.

If a defendant in error dies, a *scire facias* goes against his executor; and upon *scire feci* or two *nihil*s returned, the plaintiff shall assign his errors; and, if it be erroneous, the judgment shall be reversed. R. Yel. 113.

In error upon a *quare impedit*, if the defendant takes out a *scire facias quare executio non*, &c. which is returned *scire feci*, at the day [\*] of the return, the plaintiff may assign his error though the *scire facias* was general, and not *ad assignandum errores*. R. Dy. 77. a.

If the plaintiff in error was outlawed before error brought, and, after appearance by the defendant, he does not assign errors, the defendant may take out a *capias ullagatum*, and need not have a *scire facias*. R. Cro. El. 706.

If the plaintiff, outlawed, appears to assign errors, he shall be committed till he finds bail for the outlawry, and also for satisfaction of the party. Cro. El. 707.

If the defendant, in error upon a judgment for land, appears and is not the *tertenant*, a *scire facias* shall be awarded against the *tertenant*, before the judgment reversed or errors examined: as, in error upon a fine against the heir of the *conusee*. Dy. 321.

So, in error upon a common recovery. R. 3 Mod. 119.

If on error from Ireland, B. R. had affirmed their judgment on a collateral point, (that the *parol* might demur), plaintiff, on defendant in error's coming of age, could not take out *scire facias ad audiend errores* in B. R. in England: but the record must have been remitted to Ireland. Str. 1258

If plaintiff below brings error to reverse his own judgment, and does not proceed, the court will make a rule to assign errors in limited time, or his writ to be *non-prossed*; for *scire facias* would here be improper. 3 B. M. 1772.

*Scire facias* ought to be made returnable according to the nature of the original suit below; as, if the original suit was returnable on a day certain, and the *sci. fa.* on a general return or *vice versa*, the *sci. fa.* may be quashed on motion. *Ld. Raym.* 1417. *Str.* 694.

### (3 B 18.) Pleas to errors assigned.—*In nullo est erratum.*

When the defendant appears, if the plaintiff assigns error in fact, the defendant may join issue upon the fact. 1 Lev. 80.

If he pleads *in nullo est erratum*, he admits the fact assigned for error. *R. Yel.* 57. *R. 2 Lev.* 38. { *Bliss v. Rice*, 9 Johns. Rep. 159. *Harvey v. Rickett*, 15 Johns. Rep. 87. }

But if the fact assigned for error is no error, *in nullo est erratum* is a good plea, for it is in the nature of a demurrer, and refers the matter to the judgment of the court. *R. Yel.* 58. *R. 2 Cro.* 521. 1 Lev. 311.

As, if the error is that A. returned upon a panel, was afterwards sworn upon the tales; for it is contrary to the record. *R. 2 Cro.* 28.

That A. was returned in the panel and B. sworn. *Sho.* 49.

So, if the plaintiff assigns errors in law, the defendant may plead *in nullo est erratum*.

After *in nullo est erratum* pleaded, if the plaintiff discontinues, he shall have no new writ of error, as he may where he discontinues before plea. (*Vide Pr. Reg.* 200.)

If the defendant dies after *in nullo est erratum* pleaded, the court may reverse the judgment without a new writ of error; for the writ does not abate. *Sho.* 186.

After *in nullo est erratum*, assignment of a general error shall not be amended. 2 Mod. Ca. 304.

### [\*](3 B 19.) Release of errors, and estoppel from suing.

So, the defendant may plead a release of errors, &c. *Sho.* 50. *Ash. Ent.* 332.

A release of errors in the same instrument with the warrant of attorney, and dated in term in which judgment is entered, is good. *Str.* 1215.

A release of errors given after judgment, and an award of execution on a *scire facias*, extends to the award of execution; but not, had it been given after the judgment, and before the *scire facias* taken out. 3 Atk. 297.

So, an heir in error against him, though he has nothing in the land. 1 Rol. 766. l. 15.

And if several sue and have judgment against them, and bring error, a release of one plaintiff is a bar. 3 Mod. 135. 2 Rol. 412. l. 12. 2 Cro. 117.

So, if there are several judgments against several defendants in trespass, and they join in error, a release of one is a bar. 2 Rol. 411. l. 50.

But a release by one of the defendants in error is no plea against the others. *R. 3 Mod.* 109. 135. *R. 6 Co.* 25. b.

Though they were all sued jointly, and for a personal thing. *R. 3 Mod.* 109. *R. 2 Cro.* 117.

For he who released may be summoned and severed, where summons and severance lie in the original action. 6 Co. 25. a.

So, where there is judgment against several for a thing in the realty, a

release of errors by one is no bar against the others : as, upon a judgment in partition. R. Cro. El. 65.

A release of errors pleaded after the *essoins*-day, and before the *quarto die post*, must be *puis darrein continuance*. R. 2 Cro. 243.

If a release of errors is pleaded, the judgment shall be *quod* the plaintiff in error *nil capiat per breve*, not that the judgment shall be reversed, when it is erroneous. R. Sho. 50. Str. 127. Str. 683.

Nor, will the court affirm the judgment, on the principle that the plea is a confession it was erroneous. Str. 127. Str. 683.

So, if the release is mispleaded, or found against the defendant, the judgment shall not be traversed, except where error appears upon the record. Semb. 1 Sal. 268.

If error in fact is alleged, which does not appear by the record, nor is confessed by the party, the court *ex officio* award a *certiorari ad informand. conscientiam*. Per three J. Holt cont. 1 Sal. 268. Mod. Ca. 113. 206.

So, the defendant in error may plead a fine after the land recovered and five years passed. R. 1 Rol. 766. l. 10.

So, a release by the demandant of his right in the land, though the defendant has nothing in the land. Ibid. l. 20.

Or, bastardy of the demandant, where it is material. Ibid. l. 17.

The statute of limitations may be pleaded. Str. 1055. B. R. H. 345.

But on error to reverse a common recovery, a terre-tenant can plead nothing to the *scire facias*, but a release of errors. 1 B. M. 359.

It frequently happens, in the course of a cause, that the defendant among other things consents, by rule of court to bring no writ of error, which has so far the effect of a release of errors.

[\*]But a consent to confess a judgment does not imply consent not to bring error. 2 Blk. 790.

An agreement under a consolidation rule not to bring error, is an estoppel, though error is apparent. 1 H. Bl. 21.

### (3 B 20.) Judgment in error.

If the judgment, upon writ of error, be affirmed, the court, who affirm it, may also give judgment for costs for delay of execution. 2 Sand. 225. 4 Mod. 127.

And may award execution by *capias*, *feri facias*, or *elegit*, without a *scire facias*. Cro. El. 707. Vide Execution, (I 1.)

By st. 3 H. 7. c. 10. enforced by 19 H. 7. c. 20. it is enacted, that when judgment shall be affirmed, or the writ discontinued, or the party nonsuited on a writ of error brought by a defendant or tenant, the person against whom it is sued out shall recover his costs and damage for his delay and wrongful vexation in the same, by discretion of the justices before whom such writ of error is sued.

The court of Exchequer-chamber will allow interest, to a defendant in error under this statute on a judgment of *non-pros*, as well as on a judgment of affirmance. 1 Bos. & Pull. Rep. 29.

For the future the interest allowed will be 5l. per cent. instead of 4l. Ibid. Vide Costs, in Error, (B).

The word damage in this statute means something different from costs. Doug. 753. a.

And where the action is for the recovery of a debt, the interest ought to be the measure of the damage. Ibid. Vide Damages, (D.)

In debt on a recognizance, bail in error in the Exchequer-chamber are not liable to pay interest on the judgment between the time of signing the judgment in B. R.

and the affirmance of it in *Cam. Scacc.*, but they are liable for interest due subsequent to the affirmance. 2 T. R. 157.

In debt on a judgment affirmed in error, the jury by way of damages may give interest on the sum recovered by the judgment from the time of signing it, where, by the practice of the court in which error is brought, such interest is not allowed in costs on the affirmance. 2 T. R. 78.

If judgment of C. B. be affirmed in B. R., the latter may award execution. Cowp. 843.

But in a writ of error to the House of Lords, if the judgment be affirmed, the transcript is remitted into B. R., which awards execution. Ibid.

So, formerly, in a writ of error from B. R. in Ireland to B. R. here, the transcript was sent back by *mittimus* to B. R. in Ireland, which issued the subsequent process. Ibid.

If judgment in *quare impedit*, with damages to the patron, be affirmed, the damages on the delay shall only be assessed at the rate of the interest of the original damages. Str. 925.

If on a *scire facias* against an executor, execution is awarded, and then the record goes on with a *consideratum est etiam*, and awards costs; judgment shall be reversed as to the costs, and affirmed for the rest. Str. 188.

In an action for words, if the jury on writ of inquiry give 10s. damages, and costs are taxed at 13l. and judgment to recover them, judgment shall be reversed *in toto*. Str. 934.

An avowant is not a plaintiff within 3 H. 7. c. 10, and is not entitled to costs or damages on the affirmance by a court of error of a judgment in his favour. Dong. 709. n.

If the judgment, upon writ of error, be reversed, the court who reverse [\*]it shall give the same judgment generally as the inferior court at first ought to have given. 2 Sand. 256. 1 Sal. 401.

As, if a judgment in B. R. for the defendant in ejectment is reversed in parliament, judgment shall be there given that the plaintiff recover his term. 4 Mod. 127, 8. Ca. Parl. 57. 1 Sal. 403. Carth. 180. Skin. 515.

A court of error ought to give the same judgment upon reversal which the court below ought to have given. 1 Anst. 178. { Vide *Pangburn v. Ramsay*, 11 Johns. Rep. 141. *Commonwealth v. Ellis*, 11 Mass. Rep. 466. *Swearingen v. Pendleton*, 4 Serg. & Rawle, 389. }

Where judgment for the defendant in ejectment on a special verdict is reversed in the Exchequer-chamber, that court on motion will give final judgment for the plaintiff. 1 Bos. & Pull. Rep. 30.

And if the parliament omits or refuses such judgment, B. R. cannot afterwards give it, for by the first judgment the court has executed its authority. R. 4 Mod. 127. Ca. Parl. 57. 1 Sal. 403.

So, if judgment in C. B. for the defendant in trespass is reversed in B. R. this court shall give judgment for the plaintiff. 2 Cro. 206. R. 1 Sal. 262. 401.

So, if judgment in C. B. that the writ abate is reversed in B. R. this court shall give the same judgment as C. B. ought to have given. 2 Sand. 256. 2 Inst. 23. 4 Inst. 72. R. 1 H. 7. 12. a.

So, if a judgment in Wales is reversed there. 2 Sand. 257. 1 Vent. 61.

So, when a record is removed into B. R. from a county palatine by writ of error, and that writ is *non-prossed*, the court of B. R. will award execution into any county in the kingdom, which could not have been issued in the court below beyond the limits of the county palatine. 3 T. R. 657.

So, if the last judgment in account in an inferior court is reversed in B. R., a *capias ad computandum* shall be sued out of B. R. R. Cro. El. 806.

So, if judgment in Ireland in ejectment for the defendant is reversed in B. [\*467]



R. they shall give judgment for the plaintiff. Cro. Car. 511. Vide Ireland, (G).

So, if a judgment in the hustings is reversed in error before commissioners assigned. R. 2 Sand. 256.

Or, judgment in an inferior court is reversed in error in B. R. R. Sho. 400.

If there is judgment against two tenants (A. and B.) in dower, for dower, and for damages and costs, and they two bring error, and A. dies, and his heir and B. bring new writ of error, and judgment is affirmed; execution for damages and costs must be awarded against both plaintiffs in error; and there must be a writ of inquiry to compute damages from the judgment to the affirmance: and if otherwise, on error brought here on judgment in error in Ireland, B. R. will affirm as to the dower, and reverse as to the damages, and command B. R. in Ireland to award writ of inquiry, and to do as by law, &c. Str. 971. B. R. H. 50.

But if judgment in B. R. is reversed in the Exchequer-chamber, the record shall be remanded by the st. 27 El.; for the Exchequer has no authority but to affirm or reverse the judgment of B. R., Cont. if it is upon a special verdict. 1 Sal. 403.

And therefore, if there is judgment in trespass, upon a demurrer, for the defendant in B. R. which is reversed in the Exchequer-chamber, the record shall be remanded, and B. R. shall award a writ of [\*]inquiry, and shall give final judgment thereon. R. 2 Cro. 206. Yel. 26. 4 Mod. 125. Sal. 403.

Where the house of peers reverses a judgment, and a new judgment is necessary, it may, unless there are damages or something of that kind to be ascertained, enter that judgment. R. Ld. R. 6.

And where the house of peers might have entered the new judgment, had the record been there, the Exchequer-chamber may. Semb. Ld. R. 10.

So, the record shall be remanded where the plaintiff in error is non-suited or discontinues. 2 And. 123.

So, if judgment in C. B. for the plaintiff is reversed in B. R. in error by the defendant, there shall be judgment for the reversal only. R. 1 Sal. 262.

On the reversal of a judgment for the defendant, final judgment for the plaintiff will be given, without a rule to shew cause. 1 B. & P. 30.

And if a special verdict be found, which is insufficient whereon to give final judgment, a court of error into which the record has been removed, will (as they lawfully may, Dougl. 722.) direct the court below to award a *venire de novo*. 1 T. R. 783.

If a judgment in C. P. for the plaintiff is reversed in B. R. in error by the defendant, and a *venire facias de novo* is awarded, the *venire* must be returnable in B. R. 3 T. R. 27.

If judgment is reversed for error, the whole shall be reversed: and therefore where the declaration is upon several counts and judgment for the plaintiff, it cannot be reversed for part, if there is error only in one count, and stand for the residue. R. 1 Sal. 24. R. Carth. 235.

So, it shall not be reversed *quoad* one defendant and remain against the others who are charged with him: as, if there are three defendants, and one is an infant, it shall not be reversed *quoad* the infant only. R. Sty. 121. 125. Al. 74. } Vide Arnold v. Sandford, 14 Johns. Rep. 417. Gaylord v. Payne, 4 Conn. Rep. 130.

So, where judgment was against two persons, and only one appeared. Richard v. Walton, 12 Johns. Rep. 434.

So, if one is dead. 1 Rol. 775. l. 12.

So, if it is reversed for a fault in one particular of the writ, it shall be reversed for the whole. R. 1 Rol. 2. 1 Rol. 775. l. 5. Cro. Car. 471.

But a judgment given upon the common-law as to part, and upon a statute as to other part, may be reversed for so much as was founded upon the statute, if it is erroneous, and shall stand for the residue. 1 Sal. 24.

So when the parts of a judgment are separated; it may be affirmed as to part, and reversed as to the rest. Lill. Ent. 233. Str. 189. 808. 4 Burr. 2022. 3 T. R. 435. < Vide Smith v. Jansen, 8 Johns. Rep. 86. 2d. edit. Bradshaw v. Callaghan, 8 Johns. Rep. 435. 2d. edit. Anon. 12 Johns. Rep. 340. Nelson v. Andrews, 2 Mass. Rep. 164. Waite v. Garland, 7 Mass. Rep. 453. Whiting v. Cochran, 9 Mass. Rep. 532. Cummings v. Pruden, 11 Mass. Rep. 206.

But no costs are to be allowed on either side. Anon. *ut supra*. >

But on a writ of error where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given. But this is not applicable to the case where the damages are assessed severally on the separate counts. By Buller, J. 3 T. R. 435. < Vide Cheetham v. Tillotson, 5 Johns. Rep. 430. Backus v. Richardson, 5 Johns. Rep. 475. Richard v. Walton, 12 Johns. Rep. 434. Shaffer v. Kintzer, 1 Binn. 537. >

So, judgment in an information *qui tam*, &c. may be reversed as to the informer, and stand for the king. R. Mo. 565.

{ Judgment in a criminal case, cannot be reversed in part. Jackson v. Commonwealth, 2 Binn. 79. Vide Duncan v. Commonwealth, 4 Serg. & Rawle, 451. }

If judgment for common informer gives damages for detention and costs *de increment*. the judgment for the penalty may be affirmed, and for the damages and costs reversed. 4 B. M. 2018. 2489.

< So, as to costs. Bronson v. Mann, 13 Johns. Rep. 460. >

So, a fine may be reversed for part, and stand for the residue. R. Cro. El. 469. R. Jon. 3. R. Skin. 343.

[\*]So, a fine of land of ancient demesne, and other land, if it is reversed for the land of ancient demense in a writ of deccit, shall stand for the residue. R. 1 Rol. 775. l. 45. Vide Ancient Demense, (E 2.)

If a judgment in a civil action can be separated into parts, it may be reversed as to part and affirmed as to the residue. 4 T. R. 537.

So, where there are distinct judgments, one may be reversed and not the other; as, a judgment *quod computet*, and afterwards a final judgment; if this is reversed, the judgment *quod computet* shall stand. 1 Rol. 776. l. 40.

So, if error is brought upon the principal judgment, and also upon the judgment in *ecire facias*, and the last judgment is reversed, the first shall stand. 1 Rol. 776. l. 45.

If several damages are given, it shall be reversed for one count, and stand for another and costs. R. 2 Cro. 343.

Where two separate and independent judgments are given on the same record, upon one alone of which error is assigned, the court of error cannot examine the sufficiency of the other. 6 T. R. 200.

If judgment is reversed in error, the party shall be restored to all he has lost.

The judgment of a court of error, reversing a judgment for the plaintiff below, must award to the defendant the costs of the original action, as well as an acquittal, when entitled to them. 12 East, 668.

And a writ of restitution shall be awarded to inquire what profits the plaintiff, who recovered, has taken *colore judicii prædict.*, and for the damages found by such inquisition the defendant shall have execution. R. 2 Cro. 698.

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And it is sufficient to say all profits taken *colore judicii*, without saying since execution; for the plaintiff might have entered and taken the profits before execution sued. R. 2 Cro. 698.

And the writ of restitution shall not be avoided by bringing the value, for which the goods were sold, into court, or paying it to the defendant, for perhaps they were sold under the value. 4 Mod. 161.

But all profits *a tempore judicii* will be bad. R. 2 Cro. 698.

So, where the money appears upon record to be levied and paid to the party, the defendant shall have restitution without a *scire facias*. R. Sal. 588.

But there shall be no writ of restitution against a stranger to the record, without a *scire facias*. R. Sho. 261.

As, if a judgment upon an indictment for barratry is reversed after the money levied and paid to the collector, a writ of restitution shall not be awarded against the collector. R. Sal. 587.

If the plaintiff after a recovery in ejectment is disseised, or makes a feoffment, and then the judgment is reversed, a writ of restitution shall not be awarded against the disseisor or feoffee. Sal. 587.

If the money is levied by the sheriff, and not paid to the plaintiff, a writ of restitution shall not be awarded against the sheriff without a *scire facias*. Sal. 588.

If infancy be assigned, whereof the court doubts, a feigned issue shall go; and if found for plaintiff in error, judgment will be reversed on return of the *postea*, on motion, without argument in the paper. Str. 127.

[\*] If plaintiff in error assigns infancy in defendant, and appearance by attorney, takes out *scire facias ad audiend.*, and on *scire feci* returned, enters the default; on producing the record, judgment shall be reversed, without making it a *concilium*, or putting it in the paper. Str. 1210.

The judgment on demurrer for duplicity of errors assigned, shall be an entry, *quod affirmetur*. Str. 439.

If the statute of limitations is pleaded, the judgment shall be, that the plaintiffs be barred; although defendant had prayed that judgment be affirmed; for the court is not bound by the prayer of an improper judgment. B. R. H. 345.

If error is not brought in the same court, they cannot award a *venire facias de novo*. Ibid.

If error is brought against the judgment against testator, and award of execution against executors, the first may be affirmed, and the other reversed. Ibid.

If writ of error is quashed, the court gives leave to defendant in error to take out execution. Andr. 287.

< In what cases, a *venire de novo* shall be awarded, on reversal of judgment, and in what not. Vide *Livingston v. Rogers*, 1 Caines' Rep. 583. *Brown v. Clark*, 3 Johns. Rep. 443. *Arnold v. Crane*, 8 Johns. Rep. 62. *Ebersoll v. Krug*, 5 Binn. 51. *Sterrett v. Bull*, 1 Binn. 238. *Shaffer v. Kintzer*, 1 Binn. 537. *Miller v. Ralston*, 1 Serg. & Rawle, 309. *Reed v. Collins*, 5 Serg. & Rawle, 351.

On writ of error *coram vobis*, the proceedings only which are erroneous will be reversed; and the plaintiff may after reversal, continue the prior proceedings, without being obliged to commence his action *de novo*. *Dewitt v. Post*, 11 Johns. Rep. 460.

The judgment on reversal for error in fact is, that the judgment below be recalled, and not that it be reversed, as in case of error in law. Ibid. >

### (3 C) PROCEEDING IN ESCHEAT.

In escheat the plaintiff must count, that the land was held of him, or his ancestor, and the tenant died without heir. Rast. Ent. Escheat, pl. 1 2. Vide Escheat.

That the tenant was outlawed, or hanged for felony. Rast. Escheat, pl. 6. F. N. B. 144. H.

And the writ shall say *suspensus per collum*, though the tenant died after judgment before execution. F. N. B. 144. H.

### Pleas.

In bar the tenant may traverse the tenure. 4 Co. 11. a. Rast. Escheat, pl. 2.

Or, plead that the land descended to himself or another. Rast. Escheat, pl. 3. 5.

But seisin of services alleged in the count is not traversable. 4 Co. 11. a.

### (3 D) PROCEEDING IN FALSE JUDGMENT.

A writ of false judgment lies where an erroneous judgment is given in any court not of record, in which the suitors are judges. F. N. B. 18. a.

False judgment lies for misprision in a customary claim, though it is not claimed by the common law. R. Mo. 854.

Upon a judgment in a court of record, there shall not be a writ of false judgment, but a writ of error. Vide ante, (3 B 1, &c.)

If there are no suitors, by whom the plaint may be certified, there shall not be false judgment: as, in a copyhold court, in which, upon an erroneous proceeding, the copyholder must sue to his lord by petition. F. N. B. 18 H.

A writ of false judgment upon a judgment in the sheriff's court, is in the nature of a *recordari*. Ibid. A. B.

[\*] Upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. Ibid. D.

And it may be sued by any one against whom false judgment is given, his heir, executor, or administrator.

Or, by tenant there by resceit. F. N. B. 19. G. H.

Or, by any one who has damage, though the other defendants do not join, as they ought to do in error. R. Mo. 854.

And against the party to the judgment and the *tertenant*. F. N. B. 18. C.

Or, against the *tertenant* only, without naming him who was party to the judgment. Ibid. I.

When the whole record is certified, and not before, the plaintiff shall assign his errors. F. N. B. 18. I.

And shall have a *scire facias ad audiendum errores*, as in error. Ibid. F. G.

Or, if the defendant has day by the roll, the plaintiff may assign errors without a *scire facias* against him. Ibid. F.

If the defendant makes default after appearance, a *grand cape*, &c. shall issue against him. F. N. B. 19. B.

And if he cannot save his default, or makes a second default, the judgment shall be reversed. Ibid.

If a writ of false judgment abates, or the plaintiff is nonsuited, the plaintiff shall have a *scire facias quare execution. non*. F. N. B. 18. F. G.

The writ of false judgment ought to be served in court. 6 H. 7. 16. a.

And if the lord refuses to hold his court, a *distringas tenere curiam* goes against him. Ibid.

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The writ, being served, shall be a *supersedeas* to all proceedings there.  
6 H. 7. 15. b.

(3 E) PROCEEDING IN FORMEDON.

(3 E 1.) Process.

Formedon lies in discender, remainder, or reverter.

When it lies or not, and the nature of the writ, vide F. N. B. 211. L. 212, &c.

The process in *formedon* is summons, *grand* and *petit cape*; as, in dower. (Vide Com. Att. 217. edit. 1695.) Vide ante, (2 Y 1.)

At the return of the summons the tenant or his attorney may cast an essoin, which shall be adjourned to the 15th day after.

And every defendant may cast a several essoin, for the st. W. 1. 43. does not extend to an essoin before appearance. R. Hob. 8. Vide ante, (2 Y 1.)

If the tenant does not appear at the return of the summons, or day to which the essoin is adjourned, a *grand cape* issues.

And by the st. 32 H. 8. 21. and 16 Car. 6. it seems that the *grand cape* and summons respectively have return upon the 9th return after the *teste* inclusive.

[\*]At the return of the *grand cape* the tenant may save his default by wagging his law of *non-summons*, &c. Vide ante, (2 Y 1.)

(3 E 2.) Count.—In *formedon in discender*.

If the tenant appears upon the summons, or a day is given by essoin, or if he appears at the return of the *grand cape*, and the demandant, upon wagging his law of *non-summons*, releases the default, then the demandant shall count.

The demandant claimed under a devise, to which was annexed in the will a condition to pay a sum of money, the count set forth only the devise, omitting the condition, and held to be no objection. Willes, Rep. 1.

In a *formedon in discender*, if husband and wife were both seised in tail, the issue must demand as heir to both; if one was in tail, the other for life, he must make himself heir to him in tail only. Reg. 239. a.

The demandant must make himself heir to him who was last seised by force of the entail. 8 Co. 88. b. Dy. 216. a. F. N. B. 212. F. 216. C. Reg. 238. b.

And must mention every one in his pedigree, who was seised, or had a right descended to him by force of the entail. 8 Co. 86. b. F. N. B. 212. F.

And every one who was seised by force of the entail ought to be named son and heir, or brother and heir, &c. Ibid.

But if an heir, who survived his ancestor, died before he was actually seised, it is sufficient to name him son, without saying heir. 8 Co. 88. b. F. N. B. 212. F.

Yet if he is named son and also heir, it does not prejudice. 8 Co. 88. b. But is a safer way. F. N. B. 212. F.

So, the demandant must shew him who was last seised to be heir to the *donee*. 8 Co. 88. b.

And it is not sufficient that he is named son, if he is not also heir. Ibid.

So, if the defendant claims as cousin and heir, he must shew how cousin. F. N. B. 216. C.



In a *formedon* by husband and wife, the descent must be alleged to the wife only. Hob. 1. Vide supra.

But if a son dies in the life-time of his ancestor, he need not be named in the pedigree. F. N. B. 212. F. 8 Co. 88. b. Cro. Car. 435.

So, if a son survives, and is seised and dies without issue, his brother need not shew that he died without issue, but it is sufficient to name himself son and heir. F. N. B. 216. C. Reg. 238, 9.

So, it is sufficient, if it is not said by express words that the ancestor is dead ; for son and heir supposes it. Reg. 243. a.

### (3 E 3.) In remainder or reverter.

In *formedon* in remainder the demandant ought to mention all mesne remainders. 8 Co. 88. a.

A *formedon* in remainder must say that the prior donee died without issue. Reg. 239.

[\*]So, in *formedon* in reverter, as heir, he must mention his pedigree from the donor. 8 Co. 88. a.

And in *formedon* in reverter, he must allege the *esplees* in the donor and in the donee. F. N. B. 220. C.

If the tenant in tail discontinued, the *formedon* shall say, *remansit jus*, if not, *quod tenementa remanserunt*. 8 Co. 86. a.

But if the remainder is executed, the demandant shall have a *formedon* in *discender*, without mentioning the precedent remainders. 8 Co. 88. a. Reg. 243. b. 244. a.

So, in *formedon* in remainder, or reverter, the demandant need not name the issues of the donee ; but it is sufficient to say, *eo quod* the donee died without issue. Dy. 216. a. 8 Co. 88. a.

And in *formedon* in remainder or reverter by husband and wife, the reverter may be alleged to the wife only, or to both. R. Hob. 1.

{ A count in *formedon* in remainder, must set out the gift, the seisin of the first donee, and the demandants' title to the estate ; and that on the death of tenant for life, the right to the estate remained to him ; and the seisin of the first donee must also be proved. Wells v. Prince, 4 Mass. Rep. 64. }

### (3 E 4.) Pleas.

After count the tenant may imparl.

And after imparlance (at least after a special imparlance) may demand a view. Lut. 857. Vide ante, (2 Y 3.)

The tenant may demand a view either before or after the demandant has counted. Willes, 844.

But he is not entitled to a view where it is clear that he knows what lands are demanded. Ibid.

It is no bar to a view to counterplead that the tenant is in actual possession of the lands demanded, without adding "and of no other lands in the same vill," &c. Willes, 844.

And after view may cast an essoin. Vide ante, (2 Y 3.)

At the day given by essoin the demandant counts *de novo*, and the tenant may imparl.

At the day by imparlance the tenant must plead or vouch.

He may plead in abatement, as in other real actions. Vide Abatement.

He may plead in bar the general issue, *ne donas pas*. Lut. 851. b.

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Or, a special plea ; as, a common recovery. Noy, 1.

{ The general issue in formedon is *ne dona pas*, and *non devisavit* is a special issue. Dudley v. Sumner, 5 Mass. Rep. 438. }

Gift after disseisin, and a recovery by the disseisee subsequent to the gift.

An exchange by the ancestor of the demandant with the ancestor of the tenant for these lands, and that the demandant has the lands given in exchange. (Vide Co. Lit. 384. b.)

An estate prior to the gift, and after the gift a remitter to the prior estate.

That the donor was seised after the gift, and made an estate to the tenant, &c. in fee.

Warranty by way of rebutter. (Vide Co. Lit. 384. b. 385. a.)

So, in *formedon in discender*, a fine with proclamations. (Vide Co. Lit. 372.)

Or, a feoffment with warranty and assets. (Vide Co. Lit. 374, 375. 384. b.)

So, in *formedon* in remainder or reverter, a collateral warranty. (Vide Co. Lit. 372.)

[\*]Or, a fine and non-claim for five years after title accrued. (Vide Co. Lit. 372. b.)

Or, a fine with warranty, which descended upon the demandant. Lut. 852. b.

If the *formedon* is of a moiety, though it shews the uses of the other moiety, the defendant need not plead but to the moiety demanded. Sav. 86.

### (3 E 5.) Voucher.

If the tenant vouches, a summons *ad warrantizandum* issues against the vouchee, returnable at the ninth return after. (Vide Com. Att. 217. Edit. 1695.)

And if *nihil* is returned, an *alias*, *pluries*, and then a *sequat sub suo periculo*, and at the return of the *sequat*. the vouchee may be essoined.

Then the demandant counts against the vouchee, who may imparl, plead, and vouch over, &c.

### (3 E 6.) Amendment.

In *formedon*, the plaintiff had leave to amend all his proceedings on payment of costs, and costs of an ejectment. 3 Wils. 207. 2 Blk. 758.

### (3 E 7.) Discontinuance.

*Formedon* discontinued on payment of costs of two former ejectments. 3 Wils. 207. 2 Blk. 758. < Vide Wells v. Prince, 4 Mass. Rep. 68. >

## (3 F) PROCEEDING IN PARTITION.

### (3 F 1.) The process.

When partition lies, between whom and how it shall be made, vide *Parcener*, (C 1, &c.)

The process in partition is summons, attachment, and distress infinite. F. N. B. 62. M. 1 Brownl. 156.

At the return of the summons each defendant may cast an essoin. 1 Brownl. 156.

Or, if he does not, then at the return of the *pone*. Com. Att. 168.

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If the defendant does not appear upon the *pone*, a *distringas* shall issue, upon which he shall be amerced to five pounds, which shall be doubled *toties quoties*. Comp. Att. 168.

If one defendant casts an *essoin*, the other may have another *essoin*; for the st. W. 1. 43. does not extend to an action for division of land. R. Hob. 8.

A writ of partition must be against the tenant of the freehold. Co. Lit. 167. a. (Vide Parcener, C 6.)

But it is sufficient that the writ is general, though it is by joint-tenants or tenants in common. R. Cro. El. 743. 759.

### [\*](3 F 2.) Declaration.

When the defendant appears, the plaintiff declares against him.

By st. 8 & 9 W. 3. c. 31. s. 1. after process of *pone* or attachment returned on a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant, &c. and a copy thereof left with the occupier, &c. at least forty days before the day of the return of the said *pone* or attachment, if the tenant, &c. do not, within fifteen days after the return of such writ of *pone*, &c. cause an appearance to be entered in the court where the process is returnable, then in default of appearance, the court may proceed to examine the demandant's title and quantity of his part to purport, and award a writ of partition accordingly. Vide 2 Bl. 1134.

Which provisions in s. 1. of st. 8 & 9 W. 3. c. 31., do not apply where the tenant appears. 1 B. & P. 344.

Declaration by one parcener or joint-tenant against the others, must shew how they are parceners or joint-tenants. Cro. El. 64. Vide ante, (C 34.)

But not where they are tenants in common; for they claim by several titles, and one is not conusant with the other's title. R. Cro. El. 64.

So, if they are parceners, &c. a declaration which shews that it was the inheritance of the common ancestor in tail, is sufficient, without saying how the estate-tail commenced. R. Dy. 79. b.

But, if the declaration says, that the plaintiff and defendant were seised in fee, where it is found that the defendant has only in tail, the writ abates. R. Cro. El. 760.

Declaration on a writ of partition, and the sheriff's return, amended by striking out an erroneous description of the quality of the estates conveyed to the different parties. 1 Mars. 587. 6 Taunt. 193.

### (3 F 3.) Plea.

To the declaration the defendant may plead *non tenent insimul*.

But by the st. 8 & 9 W. 3. 31., plea in abatement shall not be admitted in partition.

And a writ of partition shall not abate by the death of defendant. { Vide M'Kee v. Straub, 2 Binn. 1.

A writ of partition can issue only in the district where the lands lie, and if lands lie in several districts, several writs must issue. Brown v. M'Mullen, 1 Nott & M'Cord, 252. }

So, the defendant cannot plead another writ of partition depending brought by him against the plaintiff. R. 1 Brownl. 158.

Nor, *non demisit*; for this amounts to *non tenent insimul*. R. 1 Brownl. 157.

{ Upon the plea of *non tenent insimul*, the defendant is not estopped by the patent granted to him and the plaintiff, as tenants in common, from giv-

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ing evidence that the former owners had amicably made partition. *Bates v. M'Crory*, 3 Yeates, 192.

Under such plea, evidence may be given, that some of the defendants are more tenants at will. *Bethel v. Lloyd*, 1 Dall. 2. }

### (3 F 4.) Judgment.

After confession of the action or issue tried for the plaintiff, there shall be judgment *quod partitio fiat*. Co. Lit. 167. b.

And thereon a writ shall issue to the sheriff to make partition. Ibid.

Upon this writ the sheriff ought to attend with the jury in person. Lit. sec. 248.

But now, by the st. 8 & 9 W. 3. 31., if the sheriff is sick, &c. the under-sheriff with two justices of the peace may make partition :

And they are obliged to attend, on pain of 5/., and shall have fees, &c.

[\*] The sheriff, after notice to the parties, in their presence, *si interesse voluerint*, must by the oath of the jury divide the tenements into equal parts, with regard to the value, and deliver one part to each parcener in severalty. Co. Lit. 167. b.

So, he who officiates as under-sheriff with two justices, shall do under the st. 8 & 9 W. 3. R. per C. B. M. 6 Geo.

And if the manor to be divided, lies intermixed with other lands, so that the jury do not know the limits, quantity, &c. of the tenements to be divided, and the owner of the intermixt lands will not shew the certainty of his land, yet the jury ought to make partition as well as they can. Dy. 266. a.

After partition made, it must be returned to the court, under the seals of the sheriff and twelve jurors. Lit. sec. 249.

After return of the partition by the sheriff, there shall be final judgment *quod partitio prædicta stabilis imperpetuum teneat*. Co. Lit. 168. a. [2 Bl. 1 159.]

So, by the st. 8 & 9 W. 3. 31. if no tenant enters his appearance within fifteen days after the return of the attachment, upon affidavit of notice to the tenant, and copy thereof left with the tenant of the land 40 days before the return, (if he be not demandant), the plaintiff may declare, and the court examine his title, &c. and give judgment by default with a writ of partition to set out his part in severalty :

And after such writ executed upon eight days' notice to the tenant of the land, and returned, judgment final shall be given, which shall conclude all persons after notice, though not named in the proceeding, and though the title of the tenant be not truly set forth.

Provided if any within a year after judgment, or if infant, *covert*, *nonsane*, or out of the realm, within a year after inability removed, by motion shew a probable bar, or that the plaintiff had not title to so much, the court may admit him to plead, &c. ; or, if he shews an inequality of partition, the court may award a new partition.

{ It is no objection to a judgment for partition, that the description of the land is loose and uncertain, because it may be rendered certain by the plan and survey to be made by commissioners. *Mitchell v. Starbuck*, 10 Mass. Rep. 20.

The return of commissioners will be supported, unless it be clearly erroneous or unjust. *Geer v. Winds*, 4 Des. 85.

The effect of a judgment in partition, and who are bound by it. *Cook v. Allen*, 2 Mass. Rep. 462. }

## (3 G) PROCEEDING IN PERAMBULATIONE FACIENDA.

A writ *de perambulatione facienda* lies, when two lords are in doubt of the limits of their lordships, villis, &c. and by consent appear in Chancery, and agree that a perambulation be made between them; their consent shall be enrolled in Chancery, and thereupon a writ *de perambulatione facienda* shall be directed to the sheriff to make perambulation *assumpt. secum 12 militibus, &c. per met. & devis., &c.* F. N. B. 133. D. 134. C.

Or, the king may grant a commission to others than the sheriff to make perambulation. F. N. B. 134. A.

And if the parties cannot appear in person in Chancery, a *dedimus potestatem* may issue to take their consent, which shall be certified, and thereupon a commission or writ shall be awarded. F. N. B. 134. C.

So, it may be awarded to make perambulation of two or three counties. Ibid. B.

[\*]So, to make perambulation of a forest. Vide Chase, (G 1.)

The return upon such writ or commission ought to ascertain the division by metes and bounds.

And perambulation made binds all parties to it and their heirs, if the parties have a fee. F. N. B. 134. A.

But perambulation by consent of the tenant for life does not bind him in reversion. Ibid. B.

Proceeding in *pone*, vide post, (3 K 6.)

## (3 H) PROCEEDING IN PROHIBITION.

Prohibition is an action founded upon an attachment for a contempt, where the defendant proceeds after a writ of prohibition served upon him.

Leave to declare in prohibition only granted when the court inclines to prohibit; not when it inclines to the contrary. 1 Bl. 81.

If on shewing cause the rule is made absolute, and plaintiff directed to declare, yet defendant may refuse to accept it, and apply to stay proceedings, and submit; and the court will stay proceedings thereupon, without costs. Str. 1149.

And the plaintiff must sue *qui tam*, &c. because a contempt to the king is supposed. 12 Co. 61. Vide Prohibition, (I).

If several writs of prohibition are sued against divers persons in the same suit, he must declare against them severally. F. N. B. 40. I.

So, if the same writ is served in several counties, and they proceed severally. Ibid.

So, several cannot join in prohibition where the complaint is several. R. Cro. Car. 162.

So, the plaintiff must allege a venue, where the prohibition was served, and the proceeding in contempt was, otherwise it will be error, though there was judgment upon a writ of inquiry and damages found. R. 1 Vent. 348. 350. Raym. 387. 2 Jon. 128.

In prohibition, the contempt is but form, and the jury need not give any verdict about it. Str. 482.

If the issue lies on plaintiff, who does not appear at trial, he must be called and nonsuited; and if defendant puts in his record, enters into his proof as a verdict and judgment, it is irregular, and shall be set aside. 1 Wils. 300.

If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant: but if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation. 1 T. R. 427.

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(3 I) PROCEEDING IN QUARE IMPEDIT.

(3 I 1.) The process.

All writs of advowson of a church, viz. right of advowson, *quare impedit*, and assise of *darrein presentment*, by a common person, shall be in C. B. Reg. 29, 30.

But a *quare impedit* by the king may be in B. R. or C. B. F. N, B. 32. E.

[\*]The process in *quare impedit* is summons, attachment and distress. 1 Brownl. 158. 2 Inst. 126.

And by the common law it was distress infinite. 2 Inst. 124.

But now, by the st. 52 H. 3. 12 Marl. if the defendant does not appear, nor cast an essoin on the first distress, or before, there shall be judgment for the plaintiff, and a writ to the bishop. 2 Inst. 124. Dy. 353. b. 1 Brownl. 158. 2 H. 4. 1. b.

Though upon the summons or *pone* the defendant was not summoned, but *nihil* returned. 1 Brownl. 158. 2 Inst. 124.

By the stat. Marl. the sheriff ought to make summons by good summoners, and return their names upon the original. 1 Brownl. 158.

And if the sheriff does not do it, *disceit* lies against him. 1 Brownl. 158. Dy. 353. b.

The summons shall be served upon the defendant, or at the church door. 1 Brownl. 158. 2 Mod. 265.

And if he be not actually summoned, there shall not be judgment upon default at the distress. R. 1 Mod. 248. 2 Mod. 264.

If there are two defendants, and one does not appear, &c. upon the first distress, the plaintiff shall have judgment and a writ to the bishop, though the other defendant appears, and perhaps shall have a writ to the bishop also. 2 Inst. 124, 5. R. Bendl. pl. 136.

And if all the defendants make default upon the distress, the plaintiff shall have judgment against all; for all are supposed disturbers. R. Mo. 81.

But upon default after continuance, there shall be a *distringas* instead of a *petit cape*. 2 H. 4. 1. b.

But before a writ to the bishop, the plaintiff ought to make title, and there shall be process to inquire of four points. R. Mo. 81. Vide post, (3 I 11.) Shall make title. Bend. pl. 136. 207.

At the return of the summons or *pone*, the defendant may have the common essoin. 2 Inst. 125. 1 Brownl. 159. Vide ante, (2 Y 1.)

Or, an essoin *de malo lecti*. Semb. 2 Inst. 124.

And if there are several defendants, one may be essoined after another. 1 Brownl. 159.

But the defendant shall not have an essoin *de servitio regis*, in *terra sanct.*, or *ultra mare*. 2 Inst. 125. 1 Brownl. 160.

Nor, shall have protection, nor his age. 1 Brownl. 160.

So, by the st. 12 Ed. 2. st. 2. after default and re-summons the defendant shall not have an essoin. R. Cro. Car. 341.

If the defendant casts an essoin, the plaintiff ought to adjourn it for fifteen days, otherwise he shall be nonsuited. 1 Brownl. 159. Dal. 81, 2.

And at the day given by the adjournment the defendant need not appear, nor before the return of the *distringas*. 1 Brownl. 159.

By the common law, and now by the st. Art. sup. Chart. 15. in sum-  
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monses and attachments there ought to be 15 days exclusive at least between the *teste* and return, in which time, at 20 miles *per diem*, any one may come from the extreme part of England. 2 Inst. 567.

[\*]By the st. Marl. 52 H. 3. 12. in *darrein presentment*, or *quare impedit*, there ought to be only 15 or 21 days before the return.

Or, a longer day may be given by consent of parties. 2 Inst. 124.

But such consent ought to appear upon record. Ibid.

The summons ought to be tested the same day it issues, that there may be no prejudice in respect of lapse. Reg. 30. a. Bro. Qu. Imp. 151.

### (3 I 2.) Original.

An original in *quare impedit* may be sued *de ecclesia*, which always imports a rectory or parsonage. F. N. B. 32. H.

So, it may be by common law, or at least by the st. W. 2. 5. *de capellis, præbendis, vicariis, hospital., priorat., abbat et aliis domibus, quæ sunt de advocacionibus aliorum.* 2 Inst. 363. 2 Rol. 98.

And therefore of an archdeaconry. R. 1 Leo. 205. 1 And. 241.

The writ ought to name the advowson truly as it is, viz. *ecclesia, vicar., &c.* F. N. B. 32. H. 33. F. G.

Yet, if it be in the disjunctive, *ad ecclesiam sive hospital.*, it is good. R. Cro. El. 791.

Yet, the writ may be general and the count special; as, if a *quare impedit* be brought by him who has only a moiety of the advowson, or the advowson *medietatis ecclesiæ*, the writ may be general, *præsentare ad ecclesiam*, and the plaintiff shall count upon the special matter. F. N. B. 33. A. 5 Co. 102. b. 10 Co. 135.

So, if the plaintiff has only the nomination, collation, &c. and not the right of presentation, the writ shall say *præsentare*, and the plaintiff shall count specially. F. N. B. 33. B. C. D. E. And if it be *nominare*, it abates. 1 Brownl. 159.

So, the writ may say generally, *quæ ad nostram spectat, donationem*, and the count declare by what title. R. Cro. El. 241. R. 3 Lev. 377. 1 Leo. 227.

But if there be a distinct patron and incumbent of one moiety or part of a church, and another patron and incumbent of the other moiety or part, the writ is good, if it is special *præsentare ad medietat., &c. ecclesiæ.* R. 10 Co. 135. b.

And *ad rector. medietat.*, or *medietat. rector.*, is of the same import. 4 Co. 75.

In what county it shall be brought, vide Action, (N 1, &c.)

If it abates by death, it may be brought by *journies accompts.* 1 Brownl. 158.

So, summons and severance lies, if one plaintiff will not sue. Ibid.

So, the plaintiff may have several *quare impedit*s against every defendant. Vide Abatement, (H 24.)

### (3 I 3.) Declaration in *quare impedit*.—For and against whom.

If one defendant appears before the others, the plaintiff may declare against him *simul cum, &c.* 1 Brownl. 159.

A *quare impedit* shall be brought by the king, in right of his crown, or upon a title by lapse.

[\*]Or, by a common person.

[\*479] [\*480]

Several, who have the same title, may join. Mo. 184.

A man who has the nomination, and another who has the presentation, may join, if a stranger presents. Dy. 48. a. in marg.

Or, have several *quare impedit*s. Mo. 49. Dal. 48.

An executor or administrator may have a *quare impedit* upon an avoidance in the lifetime of the testator, &c. R. Sav. 95. Lut. 1. Sav. 118. 1 Lep. 205. 1 And. 241.

But this is where the advowson is presentative; for, where it is donative, the turn goes to the heir, and not to the executor, &c. 2 Wils. 150.

If a grant of the next avoidance be to two, and one releases to the other, the releasee alone may have a *quare impedit*. R. Mo. 467.

If A. and B., coparceners of an advowson, do not agree to present on a vacancy, A. the eldest, (or her assigns,) may present to the first turn, and B., or her assigns, to the next. Willes, 659. 2 H. Bl. 412. S. C.

And if, when A. and B. do not agree, C. (a stranger) implead A. only by *quare impedit* on a vacancy, and recover, it is a bar to a *quare impedit* brought by B. against C. for that turn, though not for the next turn. Ibid.

In pleading a right in coparceners to present to an advowson by turns, it is good to state that such right arose, because they did not agree to present. 1 H. Bl. 376.

A *quare impedit* is usually sued against the patron who presents, the incumbent who was presented, and the bishop. 1 Brownl. 159.

But the writ does not abate, if the bishop is omitted; and therefore it will be well to omit him, if the church is full. Hob. 320.

Yet the bishop, if he is omitted, may present by lapse, except when a *ne admittas* is sued by the plaintiff within six months. Reg. 31. a. Co. Lit. 344. b. Hob. 320.

Semb. that the bishop may present by lapse, though a *ne admittas* be delivered within six months; but he cannot admit the clerk of the party, or of any other presented within six months. F. N. B. 48. L.

So, the writ may be against the patron alone, omitting the incumbent; but then the plaintiff shall not have a writ to the bishop to remove him, if he was admitted *pendente lite*. Co. Lit. 344. b. F. N. B. 35. C.

So, in a writ of right of advowson, the incumbent shall not be named. Hob. 319.

Nor, shall be removed, if the plaintiff recovers. Ibid. Sav. 109.

So, it may be against the incumbent alone, where the patron is not disturbed, nor has prejudice by the suit: as, in *quare impedit* upon an avoidance by simony of the incumbent. Semb. Lut. 1089. R. 3 Lev. 16. 206.

So, in *quare impedit* by him who has the nomination to a church in the presentation of an abbot, which comes to the king, and he presents a clerk, without any nomination, the *quare impedit* shall be against the incumbent alone; for the king cannot be a disturber. R. Dy. 48. a.

So, where the incumbent is collated by lapse, or is the only disturber. 1 Leo. 45. R. 2 Leo. 58. Sav. 108.

So, in every case, where the interest or estate of the patron is not devested by the judgment in the *quare impedit*. R. 7 Co. 26. a.

[\*]And it is safest not to make more defendants than necessary. Hob. 320.

If the patron is not named a defendant, when he ought, if it be not pleaded in abatement, it shall not be error. R. 2 Cro. 651.

So, where the king is patron, it shall be sued against the presentee only. Keil. 53. a.

## (3 I 4.) Must shew a title to the advowson.

The plaintiff in *quare impedit* must allege a title to the advowson in some one from whom he claims by descent. Hob. 102.

For a presentment, without a title to present, is not sufficient. Vau. 57.

And generally, he ought to allege a seisin in fee. Vide ante, (E 19, &c.)

But, that he was seised generally, shall be intended in fee. 8 H. 5. 4. b.

So, seisin for life is sufficient. Semb. 8 H. 5. 4. b.

Or, by purchase.

Or, by grant of the next avoidance. 8 H. 5. 4. b. Lut. 1.

Or, by grant of an estate for life, for years, or other particular estate. Semb. 5 Co. 98. a.

Or, he may allege a title to the advowson in himself. Hob. 102.

And a title to the advowson, as well as presentment, ought to be alleged in the case of the king, as well as of a common person. Vau. 57.

So, the king ought to allege in what right he is seised. 1 Leo. 227.

If the plaintiff claims by a gift in tail, he must allege a title to the advowson in the donor, and derive his title under the donee. Hut. 31.

So, if the plaintiff claims a right to present against common right, he must shew the commencement of it: as, if he alleges presentations by turns, he must shew how this commenced, by prescription, composition, or otherwise. Dy. 299. 3 Leo. 163, 4.

Yet if A. was seised of a manor to which an advowson, viz. to present twice, belongs, &c. it is sufficient; for this shews a prescription. R. Dy. 299. a.

So, the plaintiff must shew whether the advowson be appendant, or in gross. Semb. Lut. 1. Vau. 7, 8.

But if the king entitles himself to a presentation by a simoniacal contract, it is sufficient to allege a presentment by such an one, *cui de jure pertinet*, without shewing what title he had to the advowson, for the king is a stranger to it. Semb. Lut. 1093.

So, if the plaintiff alleges that he was seised of the advowson, *scilicet*, to present every first turn, it will be good. R. Mo. 867.

So, the plaintiff must shew a title in himself before the avoidance; and therefore if the acceptance of a plurality, by which the church is void, be alleged at a day before the grant of the next avoidance, by which the plaintiff claims, it will be bad. R. after verdict for the plaintiff. Dy. 129. b. Bend. pl. 79.

[\*] If there are several plaintiffs, and they vary in title, the writ abates. R. Mo. 184.

If tenants in common make composition to present by turns, the plaintiff in his count must mention the composition before it is executed. Dy. 29. a.

So, in every case where the plaintiff shews a right to present by turn, he ought regularly to shew how such right commenced, by prescription, composition, or otherwise. Semb. Dy. 259. b. 299. b.

And it may commence between parceners, joint-tenants, and tenants in common, by record, or by deed. R. 1 Sal. 43.

But after every tenant in common has presented in his turn, the composition is executed, and it need not be shewn. Dy. 29. a. 1 Sal. 43.

So, a composition by parceners need not be shewn; for it may be without deed. Dy. 29. a. 1 Sal. 44.

So, where the plaintiff claims a turn to an advowson appendant, he need not shew the commencement of the presentation by turns, whether it was

by prescription, composition, or otherwise; for the appendancy imports a prescription. Dy. 299.

And the plaintiff may claim the entire advowson when it is his turn. R. 1 Brownl. 165.

The crown has a prerogative right to present on the promotion of an incumbent to a bishopric; but where this happens in the case of a right in patrons to present by turns, it does not make a turn. 3 Wils. 232.

Where an act of parliament unites three churches, and gives the first presentation to the patron of the church of which the living was of the highest value, without taking any notice of the others, and it appears on the face of the declaration that a certain order of presentation has taken place under the act of parliament which has been acquiesced in, that is sufficient ground for presuming that the order set forth is the true order, according to the meaning of the act of parliament. 3 Wils. 233.

So, in *quare impedit* by a grantee of the next avoidance, he must shew that it is the next avoidance. Semb. Dy. 129. b.

### (3 I 5.) Must allege a presentment.

The plaintiff in *quare impedit* ought always to allege a presentment by himself, or by his ancestor, or some other under whom he claims. Vau. 17. 57.

Though the advowson be vested in the patron by act of parliament. Semb. 3 Lev. 436. Cont. 21 Ed. 4. 3. b.

And, regularly, a presentment ought to be alleged to have been by him who has the inheritance. 5 Co. 97. b.

And it may be alleged to have been by him from whom the plaintiff purchased. 2 Inst. 356.

-So, if a presentment be alleged by a tenant for life, for years, or other particular tenant, it is sufficient for him in reversion. 5 Co. 98. a.

So, if the plaintiff shews a grant of the next avoidance, and alleges a presentment by a grantee, it is sufficient for him who claims under the grantor; for he presented in right of the grantor. R. 5 Co. 97. b. Cro. El. 518. Mo. 456. Semb. Dy. 106. a.

[\*]So, in *quare impedit* a purchaser may allege a presentment by the vendor. 2 Inst. 356.

So, in *quare impedit* by a tenant for life, or years, it is sufficient that the plaintiff alleges seisin in the lessor, the demise, and a presentment by the lessee himself. Dub. Hob. 285. R. 1 Leo. 230.

The plaintiff may allege presentments by the grantor and the grantee of a particular estate, and it will not be double. 5 Co. 98. a. Cro. El. 518.

If the plaintiff alleges a presentment, without a precedent title, he must say that it was *tempore pacis*. 1 Mod. 230.

Upon pleading a presentment, the party must shew expressly that the church was vacant at the time of such presentment. 1 F. 17. 51. 99. 127.

Otherwise, it will be bad even after a verdict, if the verdict was on a collateral issue. Ibid.

But the want of it will be cured, if the opposite party states it on his pleadings, and his statement is not controverted. Ibid.

Notwithstanding such statement is in the inducement to a traverse, and that traverse cannot be passed over. Ibid.

But he need not, if a precedent title is alleged. Ibid.

If a presentment be alleged by a common person, he must say that the clerk was thereon instituted and inducted. Bend. pl. 297.



If by the king, or by him who entitles himself by the king, that he was instituted, is sufficient. *Ibid.*

Upon pleading a presentment by the king, the party must shew that the presentee was admitted, instituted and inducted. R. 1 F. 17. 51. 99. 127.

Otherwise, it will be bad even after a verdict, if that verdict were on a collateral issue. *Ibid.*

But the want of it will be cured, if the opposite party states it in his pleadings, and his statement is admitted. *Ibid.*

Notwithstanding such statement is in the inducement to a traverse which cannot be passed over. *Ibid.*

Upon a *quare impedit* by a person entitled under an act of union to present alternately with the crown upon every second turn, the declaration stated, that after the union the crown *jure coronæ* presented J. S., and upon objection, after a verdict on a collateral issue, because the church was not stated to have been vacant, nor J. S. to have been admitted, instituted, and inducted; without which that presentment would have been a nullity, and the turn in question the crown's. The court held each of the objections good; but it appearing that the vacancy, the admission, institution, and induction were stated in the defendant's plea as part of the inducement to a traverse, the court also held, that statement had removed the objections. *Ibid.*

The last presentment regularly shall be mentioned, and therefore if the bishop presents by lapse, upon the next avoidance, the patron in *quare impedit* shall make mention of that. 3 Leo. 18. Dal. 75.

But if there be an usurpation upon the king, a grantee of the next avoidance need not mention that, but only the last presentation by the king. 3 Leo. 18. Hob. 140. R. Dal. 75.

The crown, as well as a subject, must allege a presentation; and a *commendam retinere* is not sufficient. Str. 1006.

But the want of it is cured by verdict. *Ibid.*

If the declaration shews that the right of presentation under which he claims was newly created by act of parliament, and that every vacancy since the act has been filled by persons under whom the plaintiff does not claim, [\*]the necessity of shewing a presentment, either in himself or in some one under whom he claims, is superseded on account of its obvious impossibility. 1 F. 17. 51. 99. 127.

Notwithstanding, the plaintiff might suffer an usurpation upon himself, on some vacancy after the act.

Thus, where the declaration stated that the parishes of a rectory impropriate, which had been granted to the plaintiff, and of a common rectory, which belonged to the crown, were united by act of parliament; that the act provided, that the crown and the plaintiff should present alternately; that only three vacancies had happened since the act, and that the crown had presented upon each: an objection, that the plaintiff had shewn no presentation in himself, or in those under whom he claimed, was overruled. S. C. 1 F. 17. 51. 99. 127. P. C.

So, a man who founds a church, and is disturbed upon the first presentation, may maintain a *quare impedit*, without shewing a presentation. *Ld. R.* 201.

So, if the appropriation of a church, which has been appropriated immemorially, is dissolved, the heir of the first founder may maintain a *quare impedit*, without shewing a presentation. *D. Ld. R.* 201.

So may a man who is disturbed upon the first vacancy after his recovery in a writ of right of advowson. *Ibid.*

And so may the king upon the first vacancy after his title found by office. *Ibid.*

But if two presentative churches are united, and the right of presentation alternately given to the persons who before had the right of presenting to each. Each, upon his first turn, must shew a presentation to the church in right of which he claims. *R. Ld. R.* 192.

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(3 I 6.) And disturbance.

The plaintiff in *quare impedit* ought to allege a disturbance.

And if it be by an executor or administrator upon an avoidance in the life of the testator, a disturbance in the life of the testator is sufficient. R. Sav. 95. Lut. 2.

But he shall not say *in retardatione executionis testamenti*. R. Sav. 95. R. 1 Leo. 205.

(3 I 7.) Pleas in *quare impedit*.—In abatement.—Misnomer, &c.

To a declaration in *quare impedit* the defendants may imparl.

And afterwards may join in plea, or plead severally. Bro. Qu. Imp. 157. 165.

The defendants shall plead in abatement, or to the action.

An ordinary cannot plead in abatement, or cast an essoin, without making himself a disturber. Hob. 200.

In abatement the defendant may plead that the plaintiff or defendant is misnamed, or has a false addition to his name. Bend. pl. 109.

Variance between the count and writ. Sal. 559.

That there are two churches, and neither without addition, &c. or, that the church is misnamed. Vide Abatement, (H 19. 23.)

So, the incumbent may plead in abatement that such an one is not [\*]named a defendant when he ought to be. 7 Co. 25 b. Hob. 316. Vide ante, (3 I 3.)

But the bishop cannot plead in abatement that the patron is not named. Hob. 317.

So, he may plead another *quare impedit* depending for the same disturbance. R. 1 Brownl. 168. Vide Abatement, (H 24.)

So, though it is for another disturbance for the same avoidance. R. Hob. 137.

Or, adds another defendant. R. Hob. 138.

So, he may plead in abatement *darrein presentment*. Vide Abatement, (H 26.)

(3 I 8.) Plenarty.

So, he may plead plenarty, before the writ purchased, of the presentment of the plaintiff himself. Th. D. l. 11. c. 42. s. 20.

Though he does not say that the plenarty was for six months. Th. D. l. 11. c. 42. s. 20. R. by common law; for by institution and induction, or by institution only, against a common person, the church is full, and the plaintiff shall lose his presentation *hac vice* for ever. R. 6 Co. 49. a.

So, he may plead plenarty for six months before the purchase of the writ of the presentment of the defendant himself. Th. D. l. 11. c. 42. s. 22.

Or, of the presentment of a stranger. Co. Ent. 498. b.

By the common law, plenarty before the writ for any time was a good plea. 2 Inst. 360.

But by the st. W. 2. 5. it must be a plenarty for six months.

And it ought to be six months before the first writ, if another writ be sued by journeys accompts. Th. D. l. 11. c. 42. s. 8.

But, generally, plenarty is no plea against the king. 2 Inst. 361.

Though he claims in right of his ward, &c. and not in *jure coronæ*. 2 Inst. 361. R. 1 Leo. 226.

Yet if the defendant alleges a right of advowson in himself, he may plead plenarty for six months against the king. Th. D. l. 11. c. 42. s. 7. 17. Dub. s. 3.

So, by the law, plenarty shall be a good plea against the queen. 2 Inst. 361.

So, plenarty, upon a collation by a bishop by wrong, is no plea. R. 1 And. 243. Sav. 118.

So, though the bishop collated after a lapse. Dub. 1 And. 243.

If the defendant pleads plenarty, he must shew of whose presentment. Th. D. l. 11. c. 42. s. 2.

And at what time. Ibid.

So, regularly, if the defendant pleads plenarty of the presentment of an ecclesiastical person, he ought to shew the right of patronage in him. Ibid. s. 4, 5.

So, if he pleads plenarty of the presentment of himself by such an one. R. 1 Brownl. 162.

But a lay-patron may plead plenarty of his own presentment, [\*]without shewing a right to the patronage in him. Th. D. l. 11. c. 42. s. 4.

Plenarty shall not be intended, if it is not pleaded. Jon. 332.

### (3 I 9.) In bar.

In bar of a *quare impedit*, the bishop, to shew he is not a disturber, may plead that he claims nothing but as ordinary. Co. Ent. 498. d. Hob. 198. 38 Ed. 3. 2. Keil. 43. a.

The ordinary must disclaim or admit himself a disturber. Hob. 320. Vide ante, (3 I 7.)

If he refuses a clerk without cause, he is a disturber. 1 Leo. 230.

If the bishop pleads that the king made A. dean of, &c. whereby he became possessed of the church in question, he must shew that the church is a member of the deanery. Str. 837.

The clerk may plead that he claims nothing but as *persona impersonal ex presentatione* of such an one.

Upon such plea by the bishop, the plaintiff may have judgment against him with a writ to the bishop, but *cessat executio* till the other pleas are determined. Vau. 6. Hob. 320. Keil. 43. a. Vide post, (3 I 12.)

If a *cessat executio* is not entered, it is only form. R. 1 Rol. 363.

And if there be not a *cessat executio*, it is error, if execution be before the other pleas are determined. Ibid.

So, every other defendant may plead *quod non impeditur*. Win. Ent. 709. Vau. 58.

But, if the bishop disclaims, and the plaintiff does not accept his disclaimer, but will maintain him a disturber, and it is found against the plaintiff, he shall not have a writ to remove a clerk collated *pendente lite*. Hob. 320.

If one defendant pleads *non impeditur*, and it is found against him, there shall be a writ to the bishop with a *cessat executio* till the plea between the others is determined. 1 Brownl. 159.

So, the plaintiff upon such plea may have a writ to the bishop, or by replication maintain the disturbance in order to have damages. Vau. 58.

So, the defendant may plead in bar a release.

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So, the defendant may plead that he is parson *imparsonee*, and traverse his resignation.

If the incumbent pleads that he is *persona impersonata*, he ought to say of whose presentation. Hob. 320.

So, the defendant may plead in bar a presentation upon title, and traverse.

But if the incumbent pleads a presentation of such an one, he cannot make title except to the same patron by whom he was presented. Jon. 5. Hob. 321.

And, therefore, if he pleads himself to be *persona impersonata* of the presentment of such an one, the plaintiff may reply that he was not presented by him. R. Jon. 5.

But it will be more formal to say that he is not *persona impersonata*, or to shew by whom he was presented, and then traverse the presentment alleged. Hob. 321.

[\*] Yet the other way is sufficient on a general demurrer. Hob. 321.

So, by common law the incumbent or bishop shall not plead to the right of patronage; for every one ought to plead apt matter, and he has nothing in the patronage. 7 Co. 26. a. Hob. 318. Jon. 5.

Yet by the st. 25 Ed. 3. 7. to avoid feint pleading in the patron, the archbishop, bishop, &c. and possessor, may counterplead the title of the king.

And therefore every incumbent instituted and inducted may plead to the right of advowson. 7 Co. 26. a. Hob. 319.

So, an incumbent by collation. Hob. 319.

So, if he be instituted; for by institution the church is full against a common person; and the st. 25 Ed. 3. 7. by equity extends to common persons. 7 Co. 26. a. Dy. 1. b. in marg.

Otherwise, if he was only presented. R. Dy. 1. b.

Or, in the case of the king, was only instituted. Hob. 319.

Or, if after institution he resigns, or is created a bishop, pending the writ. Dy. 1. b. in marg. Hob. 319.

But the incumbent shall not only counterplead the king's title, but shall, also make title to himself. Hob. 319. Vide infra.

And must shew himself possessor. R. Dy. 293. a.

So, by the st. 25 Ed. 3. 7. an archbishop, or bishop, who collates by lapse may make title to the patronage in a *quare impedit* brought by the king. Hob. 318.

So, in a *quare impedit* by a common person, who is not the rightful patron where the bishop presents by lapse. Hob. 319.

But an ordinary, who has not collated by lapse, cannot plead to the right, since the st. 25 Ed. 3. any more than by the common law. Ibid. Jon. 5.

In *quare impedit* the defendant is actor, and may have a writ to the bishop, if judgment be for him, as well as the plaintiff. Vau. 7.

And when the defendant is actor, and requires a writ to the bishop, he must make a title in himself, as well as the plaintiff. Ibid.

And therefore he must allege a title to the advowson. Vau. 8. Vide ante, (3 I 4.)

A presentation in himself, or another under whom he claims. Vau. 7. Vide ante, (3 I 5.)

But where the defendant has presented, and his presentee is instituted and inducted, so that a writ to the bishop for him is not necessary, he is not then regarded as an actor. Vau. 7.

And therefore, if the defendant controverts the title alleged by the plaintiff, and does not stand upon his own title, he may allege a title *pro forma*, and

that his clerk is inducted, without alleging a presentment in himself. R. Vau. 8.

So, if the defendant demurs to the plaintiff's count, which is adjudged insufficient, the defendant shall have a writ to the bishop, without making title. Dy. 24. b.

So, in a *quare impedit* by the king, if the defendant shews a lease by the king's ancestor to A, and that during his possession B. presented him, it is sufficient, without shewing a title in B., for he shews the estate out of the king. R. 1 Leo. 45.

[\*] If the defendant traverses the title alleged by the plaintiff in his count, the traverse must be of a matter not only inconsistent with the defendant's title, but which also destroys the plaintiff's title, if it be found against him. Vau. 8.

As, if the plaintiff alleges seisin of an advowson in gross and a presentation in himself, and the defendant alleges a seisin of it as appendant, he ought not to traverse the seisin in gross, though it be inconsistent with the defendant's title; for if he presented, though by usurpation, he has a title, whether the advowson be appendant or in gross. R. Vau. 9, 10. Semb. Dy. 78. b. 1 Leo. 154.

So, he ought not to traverse the seisin of the advowson. Vau. 12.

So, if he alleges seisin of the advowson as appendant, and a presentment, without saying that he presented to it as appendant, he cannot traverse the appendancy. R. 1 And. 270. Vau. 15.

But, if the plaintiff alleges seisin of the advowson as appendant, and a presentment to it as appendant, the defendant may traverse the appendancy or the presentment, for one or the other destroys the plaintiff's title, if it be found against him. R. Vau. 15. R. 1 Leo. 154.

So, if the plaintiff alleges seisin of it, as appendant, and a presentment by the king by lapse, and the defendant says that the king was seised in gross, and presented, he ought to traverse the appendancy. Vau. 13.

So, if the defendant alleges appendancy to other lands, &c. Vau. 12.

So, if the plaintiff alleges seisin in gross, and the defendant claims as appendant, he ought to traverse that it is in gross. Keil. 51. b. Semb. Keil. 91. a. Though there, R. that he may traverse the seisin in gross or the presentment.

If the plaintiff alleges a vacancy by the death, resignation, or deprivation of the former incumbent, and the defendant alleges an avoidance by the other means; as, by a simoniacal contract, &c. he must traverse the avoidance by death, &c. and not the seisin, appendancy, &c. Vau. 16.

So, if the plaintiff alleges a vacancy by death, and the defendant alleges an avoidance by plurality, by which it belongs to the king by lapse, he ought to traverse the avoidance by death. Semb. Sav. 78.

On *quare impedit* by the king, for the next turn of a living void by promotion; if defendant confesses and avoids by pleading that the crown presented A. who is since dead, and himself now presented, and parson *imparsonat*, he need not traverse that the church is vacant by the promotion; if he does, it may be passed over, and issue taken on the avoidance. Str. 837.

So, if the defendant by his plea shews a title subsequent to the plaintiff's title, he need not traverse it: for he confesses and avoids. Vide ante, (G 1. 3.)

As, if the defendant alleges a seisin and presentment subsequent to the presentment alleged by the plaintiff. Vau. 16.

If the defendant alleges a seisin and presentment by the king, and



plaintiff by his replication alleges a grant by the king to him, and a presentment by the grantee, and upon his death a presentment [\*] of the king by lapse, &c. this avoids the presentment by the king. R. Jon. 12.

Subscribing the articles need not be averred in the plea, nor in the declaration. Str. 837.

(3 I 10.) Replication.

If the plaintiff replies to the defendant's title, it is not sufficient to destroy the defendant's title, without maintaining his own title. Vau. 60.

Though the king be plaintiff. R. Vau. 61.

But where the king's title appears, (being found by office or other matter of record,) there the king may relinquish his title, being established by record, and traverse the defendant's title. Vau. 62.

If a bishop pleads nothing but as ordinary, and dies, another defendant may suggest his death on the roll, and pray that the plaintiff may reply, and if he be nonsuited, it shall be peremptory. R. Sal. 559.

(3 I 11.) Judgment in *quare impedit*.

In a *quare impedit* by the king, the attorney-general may enter a *nolle prosequi*, upon which there shall be judgment, *quod defendants eant sine die*. Towns. Jud. 177, 8.

So, if there be judgment against the king upon a verdict or demurrer. Ibid. 179.

If the plaintiff is nonsuited, it is peremptory, and the defendant shall have a writ to the bishop. 1 Brownl. 161.

And if any defendant bars the plaintiff, his action fails. Ibid.

In *quare impedit* by the king or a common person, if the ordinary claims nothing but as ordinary, there shall be judgment against him with a *cessat executio quousq.*, &c. Hob. 198. Vide ante, (3 I 9.)

If the plaintiff does not accept his disclaimer, but maintains him to be a disturber, and he is found so, there shall be judgment, and the ordinary will be subject to answer damages. Hob. 320. Vide Damages, (A 3.)

If it is found against the plaintiff, he shall be barred, and cannot have judgment or a writ to the bishop. Hob. 320.

Though the bishop collated by lapse, *pendente lite*, and so the clerk collated shall not be removed. Ibid.

If the patron and incumbent confess the action, or *nil dicunt*, &c. there shall be judgment for the plaintiff, and a writ to the bishop.

So, if judgment be given against them upon a demurrer.

If a verdict in *quare impedit* be found for the plaintiff, the jury ought to inquire *ex officio* of four points, viz. whether the church be full; 2d, of whose presentation; 3d, the value of the church; 4th, how long vacant. Keil. 57. b.

And this is since the st. W. 2. 5. not by the common law. Hob. 318.

So, there shall be a writ of inquiry upon a judgment by default, or upon demurrer, to inquire of those four points. Dy. 241. b.

Or, after a verdict, if the jury omit it. Towns. Jud. 191. Dy. 135. a.

[\*] And till this is executed, the writ to the bishop stays. 1 Bro. Ent. 327.

But an inquisition, which finds the church full of the presentation of a stranger, does not hurt. Dy. 77. a.

After a verdict before justices of assise, by the st. W. 2. 30. st. 12 Ed. 2. 4. 14 Ed. 3. 16. the justices may give judgment immediately, and award a writ to the bishop. Dy. 76. b. 2 Inst. 424. Dy. 135. a. 260. a. Hob. 327.

Or, it may be given in C. B. 2 Inst. 424. Kel. 57. b. Dy. 135. a.

And error may be to the judges of assise, or to the judges of C. B. Dy. 77. a.

If judgment be given for the plaintiff to recover his presentation, execution shall be by a writ to the bishop. Vide post. (3 I 12.)

If it be given for damages, as it may by the st. W. 2. 5. execution shall be by *fi. fa.* or *elegit.* 1 Brownl. 158.

But not by *capias ad satisfaciend.* Ibid.

If in a *quare impedit* between common persons a title appears for the king, judgment shall be given for the king, and a writ to the bishop for the king's clerk. F. N. B. 38. E. Bend. pl. 301. R. 1 And. 53.

So, in a *quare impedit* by the king, if the issue be whether the king is seised of the advowson of B., and it is found that he is seised of two turns, and the bishop of the other turn, and it appears to be the king's turn, there shall be judgment for him. R. 1 Brownl. 164. Hob. 118.

But if a title for the king appears by the defendant's plea, there shall not be a writ for the king's clerk, without the plaintiff's confession of his title upon record. R. Hob. 126. 2 Cro. 216.

Judgment by the common law was only for recovery of the presentation, and a writ to the bishop. 5 Co. 58. b.

By the st. W. 2. 5., the plaintiff shall also recover damages. Ibid.

But since the statute, the plaintiff may waive the benefit of it, and take his judgment at common law. R. 5 Co. 59. a.

When damages or costs are allowed in *quare impedit*, vide Costs, (A 2.) —Damages, (A 2, 3.)

### (3 I 12.) Writ to the bishop.

After judgment in *quare impedit*, the plaintiff or defendant for whom the judgment is given, shall have a writ to the bishop to admit his clerk, if he be not before instituted and inducted. F. N. B. 38. B. Vide ante, (3 I 9.)

And it shall be directed to the same bishop who is defendant. Ibid. 1 Brownl. 159.

Or, if he be the patron to the metropolitan. Dy. 353. b.

For, it shall be to one or the other of the plaintiff's election. Vide Certificate, (I 3.)

Or, if the bishop is absent or out of the realm, to the guardian of the spiritualties. Dy. 350. a. 77. a.

[\*]If the archbishop of Canterbury is plaintiff, it shall be to the archbishop of York. Per Holt, Sho. 329.

It may be to the archbishop upon a judgment in *quare impedit* in Wales; for it is within his province. R. Jon. 332.

But the defendant shall not have a writ to the bishop, if the *quare impedit* abates for form or false Latin. F. N. B. 38. H.

So, if the patron makes default to the *distringas*, he shall not have it, though it abates by the incumbent's plea. Ibid. Semb. cont. Bend. pl. 136. 207.

So, if a *quare impedit* abates for form, misnomer, or insufficiency. F. N. B. 38. M. R. 7 Co. 27. b.

If the sheriff returns *quod quer non invenit pleg.* upon which the plaintiff

finds pledges in C. B. and has another writ, and the sheriff returns *tarde*, if the defendant appears, and the plaintiff makes default, the defendant shall not have a writ to the bishop, because the *quare impedit* was never served upon him. F. N. B. 38. O.

So, the defendant shall not have a writ to the bishop where he claims as parson *imparsonee*. F. N. B. 38. L.

Where there is another *quare impedit* depending for the same church against him. Ibid. R.

So, if the plaintiff is nonsuited, the defendant shall not have a writ to the bishop before title made. Ibid. K. Rast. in Qu. Imp. Evesq. 2.

Otherwise where the defendant has judgment upon a demurrer to the declaration. Dy. 24. b.

So, the plaintiff shall not have a writ to the bishop before he has counted, though all make default but the bishop. F. N. B. 38. L.

So, the king shall not have a writ to the bishop upon default till title made. Sal. 559.

But the plaintiff shall have a writ to the bishop without making title, if the defendant makes default upon the *distringas*. F. N. B. 38. N. Semb. cont. 1 Brownl. 158. Vide ante, (3 I 1.)

If a writ is awarded to the bishop, he shall admit the clerk of the party, and remove all who were admitted *pendente lite*. Hob. 320. R. 3 Leo. 138. R. Sav. 89. Hut. 24.

Though admitted upon the presentation of a stranger to the writ. Hob. 320.

Or, upon a presentment by the king. Cont. Dy. 260. a. 364. a. But it is there said that this opinion was not law. R. by three J. that the presentee of the king or a stranger *pendente lite* shall not be removed without a *scire facias*. 2 Cro. 93.

If the plaintiff is outlawed after judgment, and the king presents by reason of the outlawry, and then the outlawry is reversed, the plaintiff shall have execution upon the first judgment, and by writ to the bishop shall remove the king's presentee. R. by three J. Periam cont. Sav. 89.

If the ordinary does nothing upon the first writ, there shall be an *alias* directed to the bishop, which may be returnable, and upon this an attachment. Reg. 42. a. 80. F. N. B. 38. C. Dy. 254. b. 350. a.

[\*] And the ordinary returns the writ *quod admisit*. Towns. Jud. 192.

Or, he may return *quod non est idonea persona*, shewing how. Semb. Dy. 254. b. Br. Jud. 9.

That the clerk did not request to be admitted. R. Keil. 71. b.

But, if the incumbent of whom the church is full, be not a party to the writ, he shall never be removed. Co. Lit. 344. b.

If the bishop refuses admittance upon a writ to him, an *alias pluries* and attachment lies against him. F. N. B. 38. C. 47. C.

And there was a fine of 10*l.* for a bad return upon the first writ, and an *alias* under the penalty of 100*l.* 3 Leo. 139.

Or, the party may have a *quare non admisit*, and recover his damages. F. N. B. 47. C. 21 H. 7, 8. b.

A *quare non admisit* shall be sued in the county where the refusal was. F. N. B. 47. F.

And out of C. B. in term, where the recovery was. Ibid. C.

So, it may be sued by the king in B. R. though the recovery was in C. B. Ibid. D.

Or, by a common person, if the record was removed there by error. Ibid. E.

So, it may be sued out of Chancery, in term-time or vacation. F. N. B. 47. C.

And it lies if the bishop refuses, though he afterwards admits the clerk. Ibid. L.

But the plaintiff shall not have his clerk admitted upon a *quare non admittit*; for it is only to recover damages. Ibid. G.

And the bishop may plead that the church is full of the presentment of such an one, not party to the recovery. Ibid. K.

### (3 K) PLEADING IN REPLEVIN.

#### (3 K 1.) Process :—By writ of replevin.

If a man tortiously takes the person or goods and chattels of another, and detains them, a replevin lies, upon which the sheriff shall be commanded upon pledges to make deliverance of the same person or goods. } Vide *Cresson v. Stout*, 17 Johns. Rep. 116. *Badger v. Phinney*, 15 Mass. Rep. 359. }

By the common law, the person of a man was replevied by a writ *de hom. replegiando*. Reg. 77. b.

So, by the common law, there was a replevin of cattle or goods by writ to the sheriff. Reg. 18. a. F. N. B. 68. D.

And replevin should be brought by him who has the property, absolute or qualified, in the goods. Vide *Replevin*, (B).

And against him who took or commanded the taking, or both. 2 Rol. 431. l. 5.

If the sheriff himself took them, it shall be against him by his proper name. Reg. 81. b.

If the writ of replevin be for divers sorts of cattle, it shall be *quare averia sua, &c.* F. N. B. 68. D.

[\*] If only for one beast, it shall be *quare equum suum, or bovem suum, &c.* Ibid.

If a live beast and a dead chattel are in the same writ, the beast shall be named first. Reg. 81. b.

For what things and when a replevin lies, vide *Replevin*, (A, &c.)

A writ of replevin is in the nature of a justicies. 2 Inst. 140.

If the sheriff does not return, or does nothing upon the writ of *hom. repleg.* or the writ of replevin, the plaintiff shall have an *alias hom. repleg.* F. N. B. 68. E.

Or, an *alias replevin*. Ibid.

And the *alias* usually has this clause, *vel causam nobis significes*. Ibid.

But such clause may be omitted in the *alias*. Ibid.

If the sheriff does nothing upon the *alias*, the plaintiff may have a *pluries hom. repleg.* which recites the *alias* and contempt upon it, and commands that the sheriff make replevin, or that he himself be present to answer to the contempt. 2 H. 7. 5. b.

So, he may have a *pluries replevin*. F. N. B. 68. E.

And, if he thinks fit, he may have a writ of replevin, *alias*, and *pluries* all at the same time. Ibid.

If the sheriff makes replevin upon the *pluries*, he does not return the writ; but if he does not make replevin, he ought to return the cause. 2 H. 7. 5. b.

[\*493]

If upon the *alias* the sheriff returns property claimed, a writ *de proprietate probanda* issues. Dy. 173. a. Vide post, (3 K 11.)

If the sheriff does nothing upon the replevin, *alias*, and *pluries*, an attachment will lie against him, directed to the coroners, commanding them that they attach the sheriff to answer for his contempt, and in the interim make replevin. Reg. 81.

So, if nothing be done upon the *hom. repleg. alias*, and *pluries*. Reg. 78. a.

To the replevin, *alias*, or *pluries*, the sheriff may return, no cattle taken. Kit. 263. a. R. cont. Sal. 581. D. cont. Ld. R. 613.

Or, that the cattle are esloigned. Kit. 262. Sal. 581.

Or, dead. 32 H. 6. 27. b.

Or, that no one shewed him the cattle. Sal. 581.

And thereupon the plaintiff may have a *capias in withernam*, so many of the defendant's cattle. Reg. 82. b. F. N. B. 68. G. Dy. 189. a.

{ So, if the sheriff return *elongata*. M'Colgan v. Huston, 2 Nott & M'Cord, 444. }

So, if upon a *hom. repleg.* it be returned, that he is esloigned, there shall be a *capias in withernam* the defendant. Reg. 79. F. N. B. 68. C.

If A. brings *homine replegiando* for his wife, then *alias*, then *pluries*, to which defendant appears, and then *capias in withernam* issues: it is irregular, and process thereon shall be staid. 1 Wils. 256.

If the defendant appears at the return, he shall be committed, without a *capias in withernam*, till he produces the person, and shall not be admitted to plead. R. Skin. 61, 62.

Defendant may be bailed on *capias in withernam*, but plaintiff must first declare, and defendant plead *non cepit*; and the bail is for defendant to appear, and if judgment against him, to render his body, and be in custody till he render the person, &c. Barnes, 59.

[\*]If after defendant's appearance, and before declaration, the wife dies, the court will not on motion stay proceedings, but plaintiff shall declare, and defendant take what advantage he can by pleading. 1 Wils. 256.

*Withernam* lies upon a replevin by plaint. 9 Ed. 4. 48. b.

If a bailiff, upon a replevin by plaint, returns that he could not have a view, to make deliverance, the sheriff shall inquire by inquest, and if it be found that he could not have it, the sheriff shall award a *withernam*. 1 Brownl. 167.

And a *capias in withernam* lies against the defendant, though a peer. 11 H. 4. 15. b.

It is only mesne process, not an execution. Sal. 582.

The *capias in withernam* recites the return upon the replevin, or *hom. repleg.* F. N. B. 69. B.

If upon a *capias in withernam*, or *hom. repleg.* the sheriff returns *non est invent.*, there shall be a *capias in withernam* for the goods of the defendant. F. N. B. 68. C. 11 H. 4. 15. b.

If, upon a *capias in withernam* the sheriff returns *nulla bona quæ capi possunt*, the plaintiff shall have a *capias* and process to outlawry. F. N. B. 74. D.

If upon a *capias in withernam*, or *hom. repleg.*, or in replevin, he returns *cepi*, &c. the person or cattle taken, they are irreplevisable. R. Ray. 475. 7 H. 4. 27.

But the parties may appear upon the *withernam*, and count, &c. R. Dy. 189. a. R. Noy, 50. Vide ante, (B 5.)



If upon the *capias in withernam* the defendant pleads *non cepit*, he may be bailed. R. Sal. 581. Skin. 337.

And he is not estopped by the return of *elongat.* to say, *quod non cepit*. R. Sal. 581. Skin. 61. 76. 337. [Ld. R. 613.]

And if the return of *elongat.* be false, after judgment against the sheriff for the false return, the defendant shall be bailed. Ray. 475.

No action lies against the sheriff for a false return of "*elongatus.*" D. Ld. R. 613.

If on replevin made by the sheriff upon a plaint in the county-court, the bailiff returns that the cattle are esloigned, the sheriff must inquire of it, and if it be so found, the sheriff may award a *withernam* in the county. F. N. B. 69. C. 74. C. 1 Brownl. 167.

And, if he refuses to do it, there shall be a writ out of Chancery directed to him to award a *withernam*. F. N. B. 69. C.

And if he does not obey, there shall be an *alias*, *pluries*, and attachment. Ibid.

So, *withernam* lies in second deliverance. 1 Brownl. 167.

If the sheriff refuses a *withernam*, an attachment lies against him, and a *distringas* directed to the coroners. Ibid.

If a *nihil* be returned upon the *withernam*, an *alias* and *pluries* go, and so in *infinitum*. Ibid.

After a *withernam* awarded, if the defendant pays all damages to the plaintiff, he shall have restitution awarded. R. Cro. El. 162. 7 H. 4. 27. Ow. 46.

But it is no good return for the sheriff upon a replevin *quod mandav. ballivo qui nul. dedit respons.*, or no deliverance made; for by the st. [\*]West. 1. 17. the sheriff ought immediately to enter the franchise and make deliverance. F. N. B. 68. F.

That the cattle are inclosed in a park, fortress, &c. 8 H. 4. 19. a.

{ Goods taken by the sheriff, in execution, out of the possession of the debtor, cannot be replevied, they being in the custody of the law: but if they be taken from the possession of another, such person may replevy them. Thompson v. Button, 14 Johns. Rep. 84. Vide Mills v. Martin, 19 Johns. Rep. 7. Clark v. Skinner, 20 Johns. Rep. 465. Isley v. Stubbs, 5 Mass. Rep. 280. Morgan v. Craig, Hardin, 101.

Nor goods taken in execution, where the sheriff receives the amount of the debt, and still refuses to re-deliver the goods. Gardner v. Campbell, 15 Johns. Rep. 401. }

### (3 K 2.) By plaint.

By the st. of Marl. 52 H. 3. 21. *si averia capiantur, &c. vicecomes, post querimoniam sibi factam, ea deliberare possit, si extra libertates, &c. et si infra, &c.*

And upon this statute after plaint to the sheriff, he by parol or precept may by his bailiff replevy them. 2 Inst. 139. F. N. B. 69. E. Per Lit. 9 Ed. 4. 48. b.

And it is not necessary for him to stay till the county-court before he makes plaint, if the plaint is afterwards entered there. 2 Inst. 139. Co. Lit. 145. b. 9 Ed. 4. 48. b.

And the sheriff ought upon plaint to make deliverance of the cattle, though he himself took them. 2 Inst. 139.

[\*495]

And the plaint shall be, *quæ* A. B. (naming the sheriff's proper name,) *ca pit.* Ibid.

So, he may make deliverance, though the goods or cattle are above the value of 40s. Ibid.

Though after the taking they are conveyed into a franchise. 2 Inst. 140.

So, if they are taken in a franchise, and upon a precept the bailiff of the liberty refuses, or neglects, to deliver them, the sheriff may enter the franchise and replevy. Ibid.

So, he may upon a writ of replevin. Ibid.

And therefore, upon a writ of replevin, it is not a good return that the bailiff of the franchise *mullum dedit responsum*, or the like matter. Reg. 82, F. N. B. 68. F.

So, the sheriff may take such power for his assistance as he pleases. 3 H. 7. 1.

By the st. W. 1. 17. if the cattle are drove to a castle or fortress, and there detained *contra vad. et pleg.*, after demand, the sheriff shall make deliverance. 2 Inst. 192.

So, if they are drove into a house, park, or other place fortified. 2 Inst. 193.

And the sheriff, or his bailiff, may take the *posse comitatus* with him to make replevin. Ibid.

And no person, ecclesiastical or temporal, above the age of fifteen and under seventy, is exempt, but must assist him. 2 Inst. 194.

And therefore the sheriff cannot return that the cattle are esloigned into a castle, &c. Ibid. 8 H. 4. 19. a.

But, the sheriff must not use force, before a demand of the deliverance. 2 Inst. 193.

Nor, can he break into the house or close, if there is a door or gate open. 2 Rol. 552. l. 35.

Otherwise, if the owner at the door, &c. by force hinders his entry. 2 Rol. 565. l. 37,

### [\*](3 K 3.) By custom.

By custom in the county of Northampton, in the absence of the sheriff's bailiff the frankpledge may make replevin. 2 Inst. 139.

By the custom of London, upon security for return of the goods, or the value, the sheriff sends an officer to appraise the goods, if he can, and to deliver them to the plaintiff. Priv. Lon. 170.

By custom a replevin may be granted by the hundred court. Dub. Sal. 580.

But, a custom that goods taken in London shall not be replevied by the king's writ but only in London, is not good. Dy. 245. b.

And therefore a return of such a custom was disallowed. Dy. 246. a.

So, a custom, that a replevin may be granted in or out of court, is not good; for it cannot be but in court. R. Sal. 580.

The hundred court cannot grant a replevin by plaint. R. Ld. R. 218.

Because it is only a branch of the county-court, which has no such power.

But courts founded upon charter may have this power.

The steward of a hundred court cannot grant a replevin out of court. R. Ld. Rd. 218,

## (3 K 4.) By writ of second deliverance.

If the plaintiff is nonsuited in replevin, and his cattle are afterwards taken again for the same cause, he may have a writ of second deliverance for his cattle or goods. F. N. B. 72. D.

Whether the nonsuit is after, or before avowry. Ibid.

And this writ of second deliverance is a judicial, and not an original writ, which was granted by the st. W. 2. 13 Ed. 1. 2. 2 Inst. 341.

And this writ issues out of the record upon which the nonsuit was. Ibid.

And it must be conformable to the first record. Ibid.

And therefore, if *withernam* was awarded upon an essoignment of the cattle after nonsuit, the second deliverance shall not be of the cattle taken by the *withernam*, but of the first cattle. Ibid.

So, it must be tested upon the same day upon which the *retorn. habendo* was returnable upon the former writ. 2 Rol. 97.

If the plaintiff declares in second deliverance, the defendant avows or makes conusance like as in replevin. Co. Ent. 585.

And the second deliverance will be a *supersedeas* to the *retorn. habendo* upon the first writ, but not to the inquiry of damages; for these are given by the st. 21 H. 8. 19. for costs on the first writ. R. 1 Sal. 95. 2 Inst. 341.

It is not taken away by 11 G. 2. and is not a *supersedeas* to writ of inquiry of damages on stat. 17 C. 2. but after writ of second deliverance defendant cannot proceed on *retorn. habend.* Barnes, 427.

## (3 K 5.) Pledges, when found.

When a bond, vide Replevin, (D).

By the st. W. 2. 13 Ed. 1. 2. the sheriff, before deliverance made of the goods, ought to take pledges *ad prosequend. et pro retorno habendo*, (if return be awarded,) otherwise he shall answer the price of the goods. Co. Lit. 145. b. Vide ante, (C 16.)

[\*]And therefore, if upon a writ of replevin the sheriff does not take pledges, it will be error. R. Cro. Car. 594.

And for his default an action upon the case lies against the sheriff. R. Cro. Car. 446.

Or, against the bailiff of the franchise. 2 Inst. 340.

The high and under sheriff, and replevin clerk, are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno babendo*. 2 Bl. 1220.

And by the st. W. 2. 2. *si ballivus non habet, unde reddat, respondeat superior*. 2 Inst 340.

So, in *homine replegiando* the plaintiff shall find pledges to prosecute with effect and to deliver the person and his goods. 5 H. 7. 3. a.

So, if the sheriff takes insufficient pledges, he shall answer as well as if he takes none. 2 Inst. 340.

It is sufficient for the sheriff, in taking sureties on a replevin bond, that they are apparently responsible; he is not obliged to enquire into their actual sufficiency. 1 Mars. 27. 5 Taunt. 225.

The extent to which the sheriff is liable to render damages in case, for taking insufficient pledges in distresses for rent, is not exceeding the penalty in the bond. 2 H. B. 547. accord. 2 H. B. 86. contra.

The liability of an officer for not taking sufficient pledges in replevin is limited to the value of the distress.

And therefore if the plaintiff is nonsuited, &c. and upon the *retorno ha-*

*hendo* the sheriff returns *elongata*, the defendant shall have a writ for the cattle or goods of the pledges. *Ibid.*

And if upon the writ against the pledges the sheriff returns *nichil*, there shall be a *scire facias* against the sheriff *quod reddat tot. averia vel catalla, &c.* *Ibid.* Hut. 77. Off. Br. 243.

The person who has made cognizance, there being no avowant, should sue for the taking insufficient pledges, or none in replevin. And it seems in exclusion of him in whose right he acknowledges. 1 B. & P. 378.

Money deposited in lieu of pledges is not sufficient. R. Cro. Car. 446. Jon. 378.

Yet, one pledge is good, if he is sufficient, for it is at the peril of the sheriff that he takes one or more pledges. Cro. Car. 446.

And if the writ is removed by *recordari*, when the sheriff had not taken pledges, the court may take pledges at any time before judgment, to avoid error. R. Mar. 46. Noy, 156.

But upon a replevin by plaint, pledges are not necessary. Cro. Car. 594., for the omission is not error. R. Jon. 439.

And if the plaintiff is nonsuited, and the sheriff returns *elongata*, the defendant shall not have a writ for the cattle of the pledges, because the pledges do not appear to the court. 2 Inst. 340.

Yet, if they are found upon replevin by plaint, a *scire facias* lies against them, if return is not made. R. 3 Mod. 57. R. in C. B. Vide post, (3 L. 17.)

### (3 K 6.) Replevin how removed:—By *pone*.

If the replevin be in the county by writ, it may be removed by *pone* into C. B. or B. R. F. N. B. 69. M.

And may be removed by the plaintiff without cause. *Ibid.*

[\*]And by the defendant with cause, but not without cause. F. N. B. 70. A.

But the replevin remains before the sheriff till removed by *pone* or other writ; for the *replevin*, *alias*, and *pluries*, are all *vicontiel*. 2 H. 7. 5. b.

And therefore, if the sheriff returns upon a *pluries*, that he has made deliverance, B. R. or C. B. cannot proceed upon it; for the parties have no day in court by the writ. *Ibid.*

If a plaint is removed by *pone* or *recordari* into B. R. or C. B. the plaintiff must declare there *de novo*, otherwise the defendant shall sue out a writ *de retorno habendo*. F. N. B. 71. A.

And nothing shall be removed but the plaint, though issue is joined. *Ibid.*

And the plaint may be removed, though the plaintiff has discontinued there. *Ibid.*

### (3 K 7.) By *certiorari*.

If the replevin is in a court of record, that may hold plea in replevin, it may be removed by *certiorari*. 3 Mod. 56.

And it cannot be removed out of a court of record except by *certiorari*. Per King, C. J. Hil. 3 Geo.

Though the plaint was begun in the county, hundred, &c. and afterwards removed into a court of record. Per King, *Ibid.*

After removal the plaintiff may declare *de novo* in B. R. or C. B. when the plaint removed is transmitted there by *mittimus*. Bro. R. 419.

(3 K 8.) By *recordari*.

As to a *recordari* in ancient demesne, and generally, vide Ancient Demesne, (G 5.)

If the replevin be in the county by plaint, it may be removed into C. B. or B. R. by *recordari*. F. N. B. 70. B.

And this by the plaintiff without cause in the writ, and by the defendant with cause. Ibid.

If the sheriff returns the *recordari*, *tarde*, the party shall have an *alias recordari*. Ibid.

And though the *recordari* is tested before the plaint entered, yet it is good. F. N. B. 71. D. Bro. Recordari, 9. 1 R. 3. 4.

And false Latin in a *recordari* does not vitiate it; for the proceeding shall not be upon that, but upon the plaint removed. Dal. 33. Moore, 30. pl. 97.

But if the *recordari* varies from the plaint in the names of the parties, in the things comprised, &c. the plaint shall not be removed. Dal. 1. 33. Moore, 30. pl. 97.

The *recordari* in replevin is filed by filazer, in other actions by prothonotary Barnes, 222.

(3 K 9.) By *accedas ad curiam*.

If the plaint be in the court of another lord, it may be removed into B. R. or C. B. by *recordari* to the sheriff, commanding him *quod accedas ad curiam et in plena curia ill. recordari facias*, &c. F. N. B. 70. B.

[\*]As, if it be in a hundred-court, wapentake, tithing, &c. Ibid.

But it cannot be removed by an *accedas ad curiam* which bears date before the plaint entered. F. N. B. 71. D.

Nor, two plaints by one *recordari*. Bro. Recordari, 11. 3 H. 7. 14. a.

Nor, if there is a material variance between the plaint and *recordari* in the name of the court, or of the parties. Dal. 33.

Nor, shall it be removed out of a court, which is not the king's court, without cause, neither by the plaintiff nor by the defendant. Reg. 85. b. 2 Inst. 339.

## (3 K 10.) Declaration in replevin.

Where the replevin is removed by *recordari*, the declaration must be entitled either of the term in which the writ is returnable, or of that in which it is delivered; if entitled of an intermediate term, judgment signed for want of a plea, will, on application made in due time, be set aside. 5 Taup. 771.

The declaration in replevin may be laid in the county where the cattle or goods were taken.

Or, in the county into which they are drove after the taking. F. N. B. 69. I.

Or, in both. Cont. Ibid.

Since it may be out of the plaintiff's power to ascertain in what place the chattels were first taken, he is allowed to declare that they were seised in any place wherein they have been discovered in the defendant's possession. And if the taking there would not have been justifiable, the defendant may shew where he took them, and that he had them in the place, &c. in his way to the pound. 2 Wils. 354. 2 B. & P. 480.

The declaration must be several by every one, who has several property; for two persons, who have not a joint interest, cannot join in replevin. Co. Lit. 145. b. 3 H. 4. 16. a.

[\*499]



Though husband and wife jointly cannot maintain replevin for taking the goods of husband and wife ; yet if defendant avows, it shall be intended that the taking was before the coverture, and that they had then a joint property. Str. 1015. B. R. H. 119.

And in that case the taking must be laid *ad damn. ipsor.* Ibid.

The declaration in replevin ought to mention the place in which the taking was. 1 Sid. 9. Barnes, 353. Willes, 475.

And, if it is omitted, the defendant may demur to the declaration. Willes, 475. R. Cro. El. 896. Mo. 678. Hob. 16. D. Ray. 34.

So, if there is a blank for the place. R. 35 H. 6. 40. Hob. 16.

Though the name of the vill, in which, is mentioned. Cro. El. 896. Hob. 16. Mo. 678.

So, it ought to mention the vill in which the place is. 1 Sid. 10.

So, if it mentions several cattle taken in A. and B., for all the cattle cannot be in both places ; but the declaration must say how many are in one, and how many in the other place. R. Lit. 37.

If it mentions a place in A. and by replication avers that the same place was in B. it will be a departure. R. 1 Sid. 10.

[\*]If the defendant avows in another place, he must traverse the place in the declaration. R. upon a general demurrer. Lut. 1150. 9 H. 6. 39. b.

But the omission of the place or vill will be aided, if the defendant does not demur for that. R. 1 Sid. 9. 20. Willes, 475.

It must be conformable to the original ; and therefore, if the original is *pro averiis*, and the declaration *pro equo*, it is error. R. Cro. El. 330.

Or, if the original is in the *detinet*, and the declaration in the *detinuit*. Lut. 1150. Vide ante, (C 13.—3 K 1.)

It must mention the cattle, or goods, demanded with such certainty, that the sheriff may make deliverance of them.

In a declaration in replevin, for taking goods, the description, number, and value of them must be stated with certainty. 1 Moore, 386.

Fourteen skimmers and ladles, and three pots and covers, is sufficient certainty. Str. 1015. B. R. H. 119.

And therefore, if it is for 100 sheep, *matrices et vervices*, without saying how many of each sort, it is bad. R. Al. 33. Cart. 218. Vide ante, (C 21.)

It must mention the species of cattle ; as, sheep, cows, &c. Cart. 218.

And the value. Per Ellis. Ibid.

If the cattle taken are returned, the declaration shall say *quare cepit, &c. et ea detinuit contra vad. et pleg. quousque, &c.* 1 Sand. 347.

If they are not returned, it shall be, *quare cepit, &c. et adhuc detinet contra vad. et pleg. omitting quousque, &c.* Rast. Ent. 560. Co. Ent. 610. b.

So, if only part are returned, it shall say as to that *detinuit quousque*, and for the residue *adhuc detinet*. Co. Ent. 611. b. 613. a.

If the declaration is in the *detinet*, the plaintiff shall recover the value of the cattle, damages for the taking, and costs. F. N. B. 69. L.

But he cannot recover the cattle in *specie*, but only the value. Dal. 84.

If the defendant appears upon the *withernam*, the plaintiff shall count upon the writ of *withernam*. Dy. 189. a. Co. Ent. 611. b. 613. a.

And thereon pledges may be found for delivery of the cattle taken upon the *withernam*, and also for the cattle esloigned. Co. Ent. 611. b. 613. a.

And the delivery shall be pledged before avowry. Per Dy. Dal. 65.

[\*500]

The rule to declare in replevin, may be served at any time before it expires. 11 East, 103.

The practice on a rule for time to declare in replevin is the same as in other actions. 5 Taunt. 35.

Where the writ removing a replevin, is returnable the first return of a term, and the plaintiff does not declare until after its expiration, though from the defendant not having appeared, the defendant is entitled to an imparlance. 2 B. & P. 137.

If the declaration is only for part of the cattle, the defendant may [\*]avow for them and the others, and pray a writ to the sheriff immediately for the others, if replevin was made of them. 1 H. 7. 12. b.

{ Replevin will not lie for an undivided moiety of a chattel ; and if it appear from the declaration that the plaintiff is a part owner, the court will abate the process, *ex officio*. Hart v. Fitzgerald, 2 Mass. Rep. 509. }

### (3 K 11.) Pleas in replevin.—In abatement.

To replevin the defendant may plead in abatement, or in bar.

In abatement, *quod cepit in alio comitatu*. Th. Br. 65.

*Quod cepit in alio loco*, with a traverse of the place in which, &c. Asht. Ent. 474. Mod. Ca. 102. Vide ante, (3 K 10.)

*Cepit in alio loco*, is a plea in bar, not in abatement ; though it pray judgment of the declaration, no affidavit is necessary, nor need it be pleaded in four days after declaration delivered. Barnes, 353. Willes, 475.

To which the plaintiff may join in issue upon the traverse. Asht. 475.

Or, reply that the place is known by one name or the other.

*Quod locus in quo, &c. est in al. vill.* R. 2 H. 6. 14. a.

So, in abatement, the defendant may plead property in him, and not in the plaintiff. Co. Ent. 314. b.

So, if there are several cattle, the defendant may plead that the property of part is in him.

So, the defendant may say that the property is in a stranger, and not in the plaintiff. Clift. Ent. 654. 39 H. 6. 35. a. R. Cro. El. 475. 9 H. 6. 39. b. { Vide Harrison v. M'Intosh, 1 Johns. Rep. 380.

In such cases, the party is entitled to a return without an avowry. Ibid. }

Or, in the plaintiff and a stranger. Co. Lit. 145. b. Adm. 9 H. 6. 39. b.

If the defendant claims property before the sheriff, he may return it upon the *alias* replevin, and thereon a writ *de proprietate probanda* issues ; for the property cannot be tried but by writ. Co. Lit. 145. b. 1 Brownl. 167.

And this writ issues out of Chancery, or out of B. R. or C. B. Dy. 173. a.

When it issues out of Chancery, it is an original, and goes upon the sheriff's return to the *alias* replevin. Ibid.

When it issues out of B. R. or C. B. it is judicial, and granted to the party upon the sheriff's return. Dy. 173. a.

And is only an inquest of office, upon which, if it is found for the plaintiff, the sheriff must make deliverance to him. Co. Lit. 145. b. 7 H. 4. 45. b.

If it be found for the defendant, the sheriff does not proceed. Co. Lit. 145. b. Dy. 173. a.

Yet the plaintiff may afterwards proceed in C. B. upon the writ of replevin, and the property shall be tried there. Co. Lit. 145. b.

Though the sheriff returns upon the writ the claim of property. Ibid. 7 H. 4. 46. a.

If a man claims property *in curia. com.* it must be in person, and not by bailiff, or servant. Co. Lit. 145. b.

But in C. B. he may claim by bailiff. 1 Leo. 90.

[\*501]

So, in abatement, the defendant may plead bailment to him by the plaintiff, for which detinue lies, and not replevin.

[\*](3 K 12.) In bar.

In bar the defendant may plead the general issue, *non cepit*, 1 Bro. Ent. 312.

So, if the taking was in another place, he may plead *non cepit*, though he shall have no return. Per North, 2 Mod. 199.

{ But it seems, that special matter of justification cannot be given in evidence under the plea of *non cepit*. M'Farland v. Barker, 1 Mass. Rep. 153. }

And if there are many defendants, one may plead *non cepit*. Lut. 1131.

Or, *non cepit* to part.

If the defendant appears after *wilthernam* awarded, he may plead *non cepit*; for he is not concluded by the sheriff's return of *elongavit*. R. 4 Mod. 183. Sal. 581.

But he cannot plead *non cepit infra sex annos*; for this does not answer to the detainer. 1 Sid. 81, 2.

So, the defendant may plead property in bar, as well as in abatement. 2 Rol. 64. R. 2 Lev. 92. 2 H. 6. 14. a. Adm. 1 Leo. 42. R. 3 Keb. 219. 232. R. Sho. 401. R. Mod. Ca. 81. 1 Sal. 5. 94.

And though he pleads property to all the cattle in the count, yet upon evidence he may prove a less number. 1 Leo. 43.

So, he may claim property, though the sheriff returns *elongata*. Sal. 581.

So, the defendant may make conusance, for that the property is in another. R. 1 Lev. 90.

So, he may plead property in a stranger in bar. R. 1 Sal. 5.

So, if he pleads property, and traverses the property of the plaintiff, issue ought to be joined thereon, for a traverse of property in the defendant is not material. R. Skin. 65. Dub. but held well after verdict for the plaintiff. Winch. 26.

So, the defendant may plead a release from the plaintiff.

A release, after the last continuance. Lut. 1142.

So, the plaintiff in bar of the avowry may plead a release from the defendants, or one of them. Lut. 1143.

Or, a release from him, in whose right the defendant avows, or makes conusance. Lut. 1143.

So, the defendant may plead a plea in justification, without making avowry, or conusance. R. 3 Lev. 205. Lev. Ent. 152.

But then he cannot have a return of the thing taken. 3 Lev. 205. 1 Rol. 319. l. 20.

And, if by matter *ex post facto*, he cannot have the thing taken, he must justify. 1 Rol. 314. l. 35.

Or, if he had no interest at the time of the distress. 1 Rol. 320. l. 5. 318. l. 45. 2 Cro. 436.

(3 K 13.) Avowry.—When necessary.

But if the defendant had lawful cause for the taking, the most proper and usual course is to make avowry or conusance, which is in the nature of a bar. Mod. Ca. 102.

An avowry imports a justification of the taking in his own right.

Or, in right of his wife. 2 Sand. 195.

And in all cases, where the defendant expects a return of the cattle [\*] or goods taken, he must make an avowry or conusance *pro retorno habendo*. Mod. Ca. 103.

And therefore, if the defendant pleads taking in another place, he must make an avowry *pro retorno habendo*; for the plaintiff, having alleged the property of the cattle in himself, shall not lose them without cause. 39 H. 6. 35. 1 Sal. 93, 94.

It seems that a plea in replevin, justifying the taking goods damage feasant, on a common, claimed in right of possession, without praying a return, is bad. 2 B. & P. 859.

When defendant avows at a different place to have a return, he must traverse the place in the count; but when he does not insist on a return, he may plead *non cepit*, and prove the taking at another place. Str. 507.

So, if he demurs for want of a place alleged. R. 35 H. 6. 40.

So, if he pleads property in a stranger. R. 2 Rol. 64. Cont. 1 Sal. 94.

So, in all cases where he pleads in abatement matter collateral to the action. 1 Sal. 94.

And the title of the avowry or conusance to have a return cannot be traversed. R. 1 Sal. 93, 94. R. 1 Vent. 127. Carth. 139. Willes, 475.

But, if the defendant pleads property in himself, as he thereby directly falsifies the supposed property in the plaintiff, he may have a return without avowry. Semb. 39 H. 6. 35. R. 2 Cro. 519. 2 Rol. 65. R. 2 Lev. 92. D. Mod. Ca. 103.

So, if he pleads property in a stranger in bar. R. 2 Lev. 92. Dub. Sho. 401. D. Mod. Ca. 103. 1 Sal. 94. [R. Ld. R. 217.] { Harrison v. M'Intosh, 1 Johns. Rep. 380. }

Defendant may have leave to withdraw his avowry, and avow property in a stranger. Barnes, 348.

So, if the plaintiff is nonsuited before declaration, whereby avowry is prevented, the defendant shall make a suggestion what cattle, &c. were taken, and have a writ *pro retorno*, if the sheriff *constare poterit allegationem fore veram*. R. 2 Cro. 519. Ray. 33. 2 Rol. 65.

So, if the plaintiff declares for a less number of cattle or goods, he shall make such suggestion for the cattle, &c. omitted. Ray. 34.

So, if the plaint is removed by *recordari*, and the plaintiff does not declare in C. B. Ray. 34.

If a man, who takes a distress, has no interest, he cannot avow in his own name: as, if the supervisor of a common distrains according to custom upon a surcharge of the common, he cannot avow in his own name. 1 Rol. 318. l. 45.

But he may avow, though his interest is determined after the distress before the replevin. 1 Rol. 319. l. 20.

If plaintiff dies after declaration, and before avowry, there can be no writ *de retorno habendo*, but defendant may distrain again. 2 Wils. 83.

### (3 K 14.) Conusance.

Conusance imports a justification of the taking in another right.

And therefore one defendant may avow, and the other make conusance in his right.

And if one avows and the others make conusance, without saying [\*] as bailiffs of the other, and entire damages are given, it will be error. R. Yel. 108.

If A. and B. sue on a replevin bond as the sheriff's assignees, and state that they [\*503] [\*504]

distraigned for rent due to A., it is sufficient, without stating that B. distraigned as bailiff to A. By A. joining in the distress, it sufficiently appears in what character B. distraigned. 3 M. & S. 180.

If the defendant makes conusance as bailiff or servant, he need not shew his authority. 4 Mod. 378.

If he makes it as bailiff to the king, a patent need not be alleged. Bro. Bailiff, 1.

Or, as bailiff to a corporation, he need not allege a deed. R. 3 Lev. 107.

Nor say, *per eorum præceptum*. Ibid.

Or, shew how incorporated. Ibid.

And it is not traversable, generally, whether he was bailiff or not. R. Cro. El. 14.

It is not traversable, where he justifies in trespass or replevin, as bailiff, in a close which is the freehold of a stranger. 1 Sal. 107.

But where he took contrary to the will of his master, upon such inducement it may be traversed. R. 3 Lev. 20.

So, it may be traversed, that he took as bailiff to another, and not to A. R. 1 Leo. 50. R. 2 Leo. 216. 196.

That he took of his own wrong, *absque hoc* that he took as bailiff, for this is material where the taking is of cattle. R. 1 Sal. 107.

If one defendant pleads *non cepit*, the other may make conusance in his right, for he shall not lose his advantage by the other's plea. 1 Rol. 320. l. 25.

If the defendant says *bene advocat*, &c. for *bene cognovit*, it is form only. 2 Cro. 372.

If he says *bene cognovit captionem in prædicto loco*, without saying *tempore quo*, &c. it will be well. R. 2 Mod. 4.

If he does not describe how many acres the *locus in quo* contains in his avowry, it will be well. R. Lut. 1232.

Avowry or conusance ought to make a good title in *omnibus*, for it is founded upon the right. Carth. 74.

For it is in the nature of a count, and must contain sufficient matter to have a return. 7 Co. 25. a.

And therefore, if he avows for homage, he must make a title to homage.

If the replevin is, *bona et averia cepit*, and the defendant *advocat*, or *cognovit captionem bonorum et averiorum*, but his justification goes only to the cattle, without speaking of the goods, it will be bad. R. 5 Mod. 77.

So, if the replevin is *bona et catalla et averia cepit*, and he makes avowry or conusance of the cattle only, it will be bad. R. 4 Mod. 402.

If the avowry or conusance is bad, the defendant shall have no return, though the replevin is also bad, and the declaration therein quashed for defect. R. Sho. 99.

[\*]But two defendants cannot make several avowries for the same thing, each in his own right, for each cannot have judgment severally for the same thing. 5 Co. 19. a.

So, the avowry need not be for the same thing for which the taking was; for if a man distrains for one cause, he may afterwards avow for any other cause for which the taking was justifiable. 3 Co. 26. a. 2 Leo. 196. [3 T. R. 645.]

So, an avowry for rent, if it appears that part is not arrear, will be good for so much as is due upon demurrer. 1 Sand. 287. Vide ante, (C 32.)

[\*505]



Otherwise, if he avows for an entire rent, and it appears that he has title only to two parts. 1 Sand. 286. R. Mo. 281.

Or, if he avows for 30<sup>l</sup>. part of the rent for half a year, without shewing that the residue was satisfied. R. 4 Mod. 402.

Or, if he avows *pro cert. letæ*, and for a fine for not presenting, where it appears that the fine was excessive. 11 Co. 45.

So, avowry for rent-arrear *tempore captionis* is sufficient, without saying *adhuc aretro existen*. R. Dal. 72.

So, if the avowry is for rent due at M., and the distress is alleged before M. and judgment for the avowant, it may be amended after error for it. R. Sal. 580.

But, if it is not amended, it will be error, where he takes judgment for the whole rent till M. Ibid.

If the avowry or conusance is by attorney, when he was an infant, the plaintiff may plead it in abatement. R. 1 Sal. 93.

### (3 K 15.) Avowry for rent and services.

The most usual avowry is upon distress made for rent or services.

The defendant in such avowry must allege in certain what lands are held of him, or of his lord, and by what tenure. 3 Lev. 142.

For rent. Win. Ent. 823. or 934. 937. 940. edit. 1680.

For homage. Win. 829. (or 973. edit. 1680.)

Fealty. (Vide Win. 965.)

Suit of court. (Vide Win. 986.)

Heriot-service. Vide post, (3 K 28.)

And if he alleges tenure by services of different natures or qualities, though he holds by some of the services, the tenure may be traversed. 9 Co. 33. a. R. Cro. El. 799.

If he alleges tenure by homage, he must entitle himself to it. R. Win. Ent. 859. (or 973.)

But since the st. 21 H. 8. 19. he need not allege any certain tenant. 1 Leo. 301.

So, he must allege seisin of the services, where the commencement of them does not appear by deed, &c. Vide post, (3 K 17, 18.)

And he must allege seisin by the hands of some certain person. D. 6 Co. 59. b.

And this since the st. 21 H. 9. 19. which enables an avowry for lands subject to rent, as well as before. Co. Lit. 268. b. 9 Co. 36. a.

[\*] And he must allege seisin by the hands of him who has the freehold at least. 6 Co. 57, 8. 1 Rol. 314. D.

But seisin in law is sufficient. 4 Co. 9. a. 10. 1 Rol. 314. B. Vide Seisin, (E.)

So, it is sufficient to allege seisin of rent where he avows for homage, without saying *de quibus servitiis fuit seisitus*. R. Win. Rep. 31. Win. Ent. 859. (or 973.) cont.

And therefore seisin of homage is sufficient for all other services. 4 Co. 8. b.

Seisin of any superior service is sufficient for all inferior services. Ibid. 1 Rol. 315. G.

Seisin of an annual service is sufficient for all casual services. 4 Co. 8, 9. Though not for another annual service. 4 Co. 9. a.

[\*506]

So, seisin by recovery, or by voluntary payment without coercion, is sufficient. 4 Co. 9 b. 11. b.

So, seisin need not be alleged within forty years, though by the st. 32 H. 8. 2. avowry shall not allege seisin of any rent, &c. above forty (in Cay's statutes it is fifty) years, &c. for this shall come from the other side, by plea in bar to the avowry. Dy. 315. b. R. 9 Co. 65. a. D. 9 Co. 36. a.

So, seisin by disseisor, or feoffor after feoffment, is sufficient. 6 Co. 58. a. 1 Rol. 314. l. 50.

An avowry for a rent-charge by the representative of tenant for life, need not state that the *locus in quo* was in the seisin of the plaintiff, or any person claiming under him when the arrears became due. R. Ld. R. 172.

By the common law the defendant must avow on a person certain. Co. Lit. 269. b.

And it should be upon his very tenant, generally, viz. his tenant in right and in fee. 9 Co. 21. a.

And therefore, if the tenant was disseised, before acceptance of the services of the disseisor or a descent to his heir, the lord must avow upon the disseisee, otherwise, upon shewing the matter, the avowry shall abate. Co. Lit. 268. a.

So, if the donee was disseised or made a discontinuance, the donor must avow upon the donee, otherwise he shews the reversion out of him, and his avowry shall abate. Co. Lit. 269. a. 3 Co. 30. b.

If tenant in fee makes a feoffment, the feoffee after the death of the feoffor, or acceptance of the services of him, shall compel the lord to avow upon him. Co. Lit. 269. b.

But during the life of the feoffor, and before acceptance of the services of the feoffee, the lord might have avowed upon the feoffor or feoffee at his election. Ibid.

At common law, if there was a lessee for life or donee in tail with remainder over, the lord might have shewn it, and avowed upon the lessee or donee, as his very tenant *in forma prædict.* Co. Lit. 269. a. 20 H. 6, 9. b.

If the lord had a particular estate, he might have avowed upon the tenant *in forma prædicta*, without naming him his very tenant, which imports himself to have a fee. Co. Lit. 269. a.

If a seignior, &c. came to a guardian in chivalry, he might have [\*]avowed upon the special matter, as within his fee and seignior. Co. Lit. 269. b.

But now, by the st. 21 H. 8. 19. the lord may avow, or others make conscience upon the lands holden of him, without naming any person certain.

Yet he may avow at common law, if he pleases. Co. Lit. 268. b. 269. b. 9 Co. 36. a. 23. b.

And if he avows upon land, without avowing upon any person in certain, it is good by the statute, though he names a certain person for tenant, &c. which the statute does not require. R. 1 Leo. 301. Semb. Mo. 870.

So, if cattle are driven out of the lord's view, and taken, upon pursuit, in other land, the lord may avow by the st. 21 H. 8. 19. R. 9 Co. 22. a.

So, if the defendant avows for rent, *eo quod* D. holds of him by fealty and rent, which estate the plaintiff has, it is not material or traversable, for by the statute he may avow upon the land, and which estate the plaintiff has signifies nothing. R. Mo. 883.

An avowry for an increased rent under a demise, for every acre of the land which should be converted into tillage, is supported by the evidence of a lease for a term of

years, with a covenant to pay the increased rent for every acre which should be so converted, during a part of the term, *ex. gr.* for the three last years under this statute. 2 H. Bl. 563.

In replevin the defendant avowed, &c. and stated in his avowry that by lease and release he, in consideration of an annuity therein mentioned, conveyed certain premises containing the place where, &c. to the plaintiff in fee, subject to a rent-charge, payable to the defendant during her life, with power of distress for non-payment of the annuity; and that by virtue of the lease and release, and by force of the statute, &c. the plaintiff became seised in fee, &c. and then she justified, &c. as a distress for non-payment of the annuity. Pleas in bar, 1st, that the plaintiff never was seised, &c. in fee; 2dly, (admitting that the defendant did by the lease bargain and sell, &c. to the plaintiff for a year,) that at the time of making the bargain and sale the defendant was seised, &c. only for her life, the reversion in fee then belonging to another, traversing that the defendant was seised of the reversion in fee. On demurrer both pleas were holden bad; the first, because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress. Willes, 378. [Vide 11 G. 2. c. 19.]

A general avowry under this statute, may be made for increased rent made payable for land broken up during a certain period of the term. 2 H. B. 563.

It is not necessary in an avowry or cognizance, to aver that the rent still remains due. 2 Mars. 386. 7 Taunt. 72.

{ Where the husband distrains, and avows for rent arising from his wife's land, without joining her in the proceedings, he must shew, that the rent accrued after marriage. Decker v. Livingston, 15 Johns. Rep. 479. }

### (3 K 15.) Bar to it,

To avowry for rent and services the plaintiff in bar may disclaim. 9 Co. 34. b.

So, he may disclaim generally, and thereon shall have judgment; but the lord may have a writ of right upon the disclaimer. Mod. Int. 306.

Or, confess the avowry. Mod. Int. 319.

Or plead, out of his fee, generally. R. 28 H. 6. 10.

[\*]So, he may plead out of his fee, without disclaiming, which will be perilous. 9 Co. 34. b. 28 H. 6. 10. 21 H. 7. 20. a.

Or, he may plead generally *nul tenure*. Clift. 638. R. cont. and a repleader awarded. 2 Cro. 127.

Or, he may confess the tenure in part, and traverse the tenure *modo et forma*. R. 9 Co. 33. a. 36. a. Lut. 1212.

And, if it is found for the plaintiff, he shall have judgment, though the avowry was for rent, the tenure by which was confessed. R. 9 Co. 36. a; R. Cro. El. 799.

If he alleges tenure for part of the land, he may allege that this and other land is held by such services, and traverse that only part is so held. 9 Co. 35. b.

So, he may confess the tenure and traverse the seisin. 9 Co. 33. a.

But the plaintiff cannot traverse the seisin of services generally. 9 Co. 34. b. 22 H. 6. 3. Fitzh. Avowry, 15.

For, if the lord had not seisin of the services, the plaintiff ought to confess the tenure and traverse the seisin. 9 Co. 33. b.

So, since the st. 32 H. 8. 2. he may plead, never seised within forty (in the statute, according to Cay, it is fifty) years. 8 Co. 64. b. Mod. Int. 322.

If he was seised only for part of the services, he may plead that the te-  
[\*508]

nure was by part, but never seised for the residue within forty years. 9 Co. 34, 5.

So, he cannot plead teure of a stranger, and traverse the tenure. 9 Co. 35. a. R. 10 H. 6. 6. b. for he must disclaim, or plead, out of his fee. 10 H. 6. 6, 7.

But this plea is not good, if the avowry is for casual service ; as, fealty, &c. R. 3 Lev. 21.

So, if the tenancy is granted by fine, &c. to the king, the lord cannot avow generally for rent-service. R. 1 And. 160.

So, now, since the st. 21 H. 8. 19. the plaintiff in replevin in bar, to avowry for rent may plead, nothing in arrear. R. Ray. 254, &c.

Though he does not make any title to the land. Ray. 258.

Though he is only lessee for years, or a stranger. Ray. 254.

Pleading that A. having been lawfully possessed, &c. as tenant at will to B., is a sufficient averment that A. was tenant at will. Willes, 131. 7 Mod. (8vo edit.) 251. S. C.

In a bar to an avowry for rent, pleading that corn which had been cut was left on the ground until it was fit in a course of husbandry to be carried, is sufficient, without saying how long it remained there, the reasonableness of the time being a question of fact for the jury, and not a question of law for the court. Ibid.

On avowry for rent and issue thereon, plaintiff cannot give evidence to set off a mutual debt ; but by way of special plea to avowry, he may plead mutual debt of more than the rent. Barnes, 450.

To an avowry for rent the tenant may plead the payment of a ground-rent to the original landlord. 4 T. R. 511.

So, he may plead all pleas, which he had by the common law, except disclaimer. 2 Cro. 127. Co. L. 268. b.

As, he may plead, out of his fee. 2 Cro. 127. Mod. Int. 303.

Or, traverse the tenure. 2 Cro. 127. D. that he shall plead no plea, but a disclaimer, or out of his fee. Mo. 870.

[\*]So, the plaintiff may plead in bar to an avowry, *de son tort*, with a traverse that *locus in quo*, &c. is parcel of the tenements alleged to be held. Rast. Ent. 556. b.

But by the common law before 21 H. 8. a stranger to the avowry, viz. he upon whom the avowry was not made, could not disclaim.

Nor, could plead, out of his fee, or any thing tantamount. 22 H. 6. 2. b.

Nor, nothing in arrear. Ibid.

Nor, levy by distress, and so nothing in arrear. 22 H. 6. 3. a.

But in these cases he ought to pray in aid of the very tenant, and then disclaim or plead these pleas. 22 H. 6. 2 b.

So, plaintiff to an avowry for rent upon him as very tenant cannot say *ni-ent seisie*, for this amounts to a disclaimer, and therefore he must disclaim. 21 H. 7. 20. a.

If on avowry for non-payment of rent, a plea in bar, is *de injur. sua propria absque hoc quod præd. R. cepit, &c.* *Non cepit* is no good traverse, he should pursue his title, and *de injur. sua propria* is enough. Fort. 362.

The plea of *de injuria sua propria* to a cognizance for rent, is bad on a special demurrer. 1 Bos. & Pull. Rep. 76.

The defendant pleaded *cepit in alio loco*, and avowed taking the goods in the place in question, whither they had been fraudulently conveyed within thirty days, &c. from the demised premises, as a distress for rent ; the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea ; which was holden ill on demurrer, the avowry being in the nature of a suggestion to entitle the par-

ty to a return of the distress, and not traversable. Willes, 475. Barnes, 358. S. C.

(3 K 17.) For relief, &c.

The defendant avows for relief like as for other services. 3 Lev. 142. Vide ante, (3 K 15.)

And he need not make mention of the relief in his avowry; but of the tenure only; for the relief is incident to it. R. 3 Lev. 145.

And if it be severed by release, &c. it must be shewn on the other side. Ibid.

(3 K 18.) For a rent-charge.

If the avowry be for a rent-charge, the avowant must shew his title to the rent: as, by a grant to him in fee.

Or, in tail, or for life. Co. Ent. 590.

By devise to him, or his wife. 2 Sand. 195.

By grant or devise to such an one, under whom the defendant derives his title.

By grant or devise to such an one, to whom the defendant is executor or administrator, and avow for arrears in his life. Win. Ent. 1015.

So, he ought to shew that *locus in quo*, &c. is parcel of the land charged, for to say *quod est et tempore quo*, &c. *fuit* is not sufficient; for this imports no more than it was so at the distress. R. 2 Vent. 150. 4 Mod. 150.

But the avowant need not allege seisin of the rent, where the commencement appears by deed. 8 Co. 65. a.

[\*]As, if he avows for a rent charge. Ibid.

Or, for rent reserved upon a gift in tail. 1 Rol. 314. l. 10.

Or, upon a demise for life or years.

Or, for a rent in fee, reserved by deed, upon a conveyance in fee. R. 8 Co. 65.

So, if the rent is reserved by act of parliament. R. Cro. Car. 81.

In bar to an avowry for a rent-charge, the plaintiff may say *quod non concessit*.

He may demand *oyer* of the grant and demur.

He may say that the grantor was seised in tail, &c. and traverse the seisin in fee.

That the rent was extinguished by a fine. Win. Ent. 821. (or 935. edit. 1680.)

That he made a legal tender.

(3 K 19.) For rent upon a reservation.

If the avowry is for rent upon a reservation, he must shew that he, or A. from whom the reversion descended, or was assigned, was seised, and made a lease to the plaintiff for years, or at will. 2 Saund. 310. Tho. Ent. 264. Clift. 640.

So, he may say that he holds by copy or demise.

Or, that part is copyhold, part freehold, which he demised. Clift. 640.

That A. seised, leased to the plaintiff, the reversion descended to parceners, and one assigned his part to the defendant, who avows for his part of the rent.

That A. being seised, demised to him who leased to the plaintiff for a less [\*510]



term : for it is not sufficient to shew the commencement of the term to the plaintiff, without shewing a good title in himself, by which he could make a good lease to the plaintiff. R. Sal. 562.

If defendant avows for rent, and shews that A. *habens titulum* demised to him, and he to plaintiff, it is ill ; for he should shew the commencement of the particular estate. Str. 796.

That he, being seised in fee, made a gift in tail to B. rendering rent ; for though the gift is in tail, he may avow upon the reservation. 1 Rol. 314. l. 10.

And he need not shew seisin of the rent, where he avows upon a reservation ; for it is sufficient that he has the reversion. Ibid. Vide ante, (3 K 18.)

If lessee for years assigns his whole term, and there is no clause of distress, he cannot distrain for rent. 3 Wils. 375.

(3 K 20.) Bar to it.

In bar to an avowry for rent reserved, the plaintiff may plead as in bar to debt for rent : as, *nihil in tenementis*. Vide ante, (2 W 48.)

*Nil habuit in tenementis* is no plea, (even for a stranger,) since 11 G. 2. c. 19. 2 Wils. 208.

Where an avowry for rent service is general on possession, a plea traversing the seisin of any specific estate, is bad. 1 N. R. 56.

*Non demisit*. Clift. 641. 2 Sand. 312.

Nothing in arrear. [Cowp. 589.]

[\*]“ Nothing in arrear” must be pleaded generally, and conclude to the country.

A plea of *de injuria*, with a traverse that the rent was in arrear, concluding to the court, was held bad on a special demurrer. Ld. R. 639.

Nothing in arrear for part of the rent, and tender of the residue. Clift. 646.

That the avowant afterwards used or sold the cattle or goods distrained. Lut. 1423.

After issue joined upon a plea in bar to an avowry, the court will not suffer the plea to be withdrawn, and the avowry confessed, without consent, for the avowant will lose his costs. Skin. 594.

Suspension of the rent by eviction or expulsion. 1 Roll. Abr. 938. Cowp. 243.

But where the bar states merely a trespass, and no eviction or expulsion ; it is no suspension of the rent, and consequently bad on demurrer. Cowp. 242.

Hence in replevin upon a distress for rent, plea in bar that defendant pulled down a summer-house, whereby the plaintiff was deprived of the use thereof, without saying that he was expelled, or put out of the same, is insufficient. 1 Cowp. 242.

A plea in bar to an avowry damage feasant, claiming that the *locus in quo* be laid open on or before a particular day, and thence for such a specific time and upwards, and that the cattle were upon the land during the time when it ought to have laid open as aforesaid, is, even after verdict, bad for uncertainty. 2 B. & P. 257.

There cannot be a set-off to an avowry for rent. 4 T. R. 511. Id. 512.

If in replevin for goods and chattels, to wit (*inter alia*) a lime-kiln, the plaintiff to an avowry as a distress, plead that the kiln was affixed to the freehold, it is a departure. 4 T. R. 505.

The plaintiff in replevin, may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant with a plea of infancy. 1 Mars. 74. 5 Taunt. 340.

(3 K 21.) For damage feasant.

If the defendant avows, or makes conusance for damage feasant, he must shew that the place where, &c. is his freehold, or the freehold of B. under whom he makes conusance. Lut. 1140. Vide post, (3 M 26.)

And if he says that he himself or B. was seised, he must say of what estate in fee, tail, or for life. R. Lut. 1232.

In replevin for taking cattle in Holloway-road, avowry for taking them in the place where, &c. ; for that he took them damage feasant in Four-acre Close, and drove them along the road to pound them, is good. 3 Wils. 295. < Vide Loomis v. Tyler, 4 Day, 141. >

One tenant in common cannot avow alone for taking cattle damage feasant ; but he ought also to make cognizance as bailiff of his companion. Sir W. Jones, 253. 1 Roll. Abr. 220. pl. 14. 2 H. Bl. 366. Cro. Eliz. 530.

< Where the defendant justifies the taking of beasts as a distress damage feasant, the plaintiff may reply, that the avowant, after making the distress, abused it, so as to render him a trespasser *ab initio*. Hopkins v. Hopkins, 10 Johns. Rep. 369. >

### (3 K 22.) Bar.—His freehold.

To this avowry the plaintiff may say in bar, that it is his freehold. Vide post, (3 M. 34.)

Or, the freehold of A. and by his license he put his cattle there. 1 Ca. 64. a. Vide post, (3 M 34.)

Or, a special title by devise, fine, demise, &c.

### [\*](3 K 23.) Tender of amends.

So, the plaintiff may say in bar, tender of amends.

If the defendant pleads that he was seised of three acres in *loco in quo*, &c. it is sufficient, without saying how many acres the *locus in quo*, &c. had. R. upon special demurrer. Lut. 1232.

### (3 K 24.) Bar by common.

In bar of an avowry for damage feasant, the plaintiff may say that he is entitled to common in the place where, &c. and this, common appendant or appurtenant.

Common by reason of vicinage.

In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appendant, appurtenant, or in gross ; but the court will judge of it from the nature of the right claimed. Willes, 319.

If a commoner having right of common for one beast, put on two, the lord can distrain only the one put on last, unless they were both turned on together ; and it must be shewn in a plea (justifying the taking as a surcharge) whether they were put on together or separately, and, if the latter, which was put on first. Willes, 638.

And he must shew in what vill the land lies to which he claims common. R. 2 Cro. 238.

That his lesser is entitled to common for him and his tenants. Co. Ent. 573. b.

If the plaintiff prescribes for common, he must make a good title to the common. And for common appendant or appurtenant, he must shew a seisin in fee of the land to which he claims common, and then allege that he and all *quorum statum*, &c. Time whereof, &c. have had common in such place, &c. 1 Sand. 346. Co. Lit. 113. b.

If he claims common in gross, he need not allege seisin of the land, but only that he and all his ancestors have had, time whereof, &c. common in such place, &c. 1 Sand. 346.

If a copyholder claims common in another manor, he must allege seisin in his lord, and that he for himself and his customary tenants has common in such place, &c. (Vide 2 Sand. 326.)

If he claims common in a waste of the same manor, he must allege it by way of custom. Co. Lit. 113. b. Vide Copyhold, (K 6.)

And he need not shew what estate the copyholders have in their customary tenements. R. 2 Sand. 326.

If the plaintiff is a lessee for years, he must allege a seisin in his lessor, who has the fee, and prescribe in him and all those *quorum statum*, &c., and then derive the term to himself, &c. ; for if he alleges a prescription in himself, it is bad. R. Cro. Car. 599.

So, he must allege a prescription for common, time whereof, &c. where it is contrary to common right : as, for common appurtenant, or by reason of *vicinage*, and it is not sufficient to say that all *habuerunt et habere consueverunt*, without more. R. Latch. 161.

If he prescribes for common appendant, he ought to claim it only for cattle *levant* and *couchant*. R. Lut. 1359. R. 1 Sid. 313.

But, if he prescribes for common appendant to a house or cottage, [\*]it will be well, for this comprises any land. R. 1 Sal. 169. Semb. 1 Brownl. 198.

In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a messuage, it is necessary to allege that the messuage was out of repair ; that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of the messuage, and that the materials were used for that purpose. 6 T. R. 748.

And for cattle *levant* and *couchant* is sufficient, without other certainty. R. 1 Brownl. 198.

So, he must allege *user* of the common according to his prescription : as, if he claims common for cattle *levant* and *couchant*, he must shew that the cattle put there were *levant* and *couchant*. 1 Sand. 28. R. H. 10 An. in C. B.

But the omission shall be aided after verdict. 1 Lev. 196. R. 1 Sand. 227. R. 2 Cro. 44.

And after a general demurrer. R. cont. 1 Lev. 196.

And if he claims common appurtenant for a certain number of cattle, without saying *levant* and *couchant*, he need not shew that they were so. R. 2 Cro. 27.

If the plaintiff claims common for all commonable cattle, he must shew that the cattle put there were so. Semb. Lut. 1470.

If he claims common, from the time of cutting and carrying away the corn, till the land is sown again, he must shew that the cattle were put there within that time. R. 2 Cro. 637. Vide Pl. Com. 33. b.

And he must say that no part of the land was sown again. 2 Cro. 637.

A prescription for common of pasture for a certain number of sheep on A. every year, at all times of the year, is well laid, though the evidence which proves the right of common proves also that the tenant of a certain farm has a right to have the sheep folded at night on his *farm*, after they have fed on the common during the day. 2 H. Bl. 224.

### Replication.

To a prescription for common the defendant may reply *de son tort*, with a traverse of the prescription.

If the common claimed by the plaintiff in his plea in bar to the *avowry*, be in common fields belonging to different owners, the defendant may reply a custom for any one of these owners to inclose his own field, and thereby discharge it from the right of common of the others. Vide 2 Wils. 269. 274.

And it is a legal consequence which wants no proof, that by inclosing, the party excludes himself from any right of common in the uninclosed lands. *Ibid.*

Or, with a traverse of the *levancy* and *couchancy*; for this goes to the gist of the justification. R. Win. Ent. 972. Per Holt, Mod. Ca. 115. Semb. 1 Sal. 169.

Yet the foddering of the cattle in his yard is evidence of their being *levant* and *couchant*. 1 Sal. 169.

A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual convenience [\*] and advantage, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If during the term the cattle of B. come upon the land of A., he may distrain them damage feasant; and may in his replication (in answer to a plea pleaded by B. of his right of common, in bar of the cognizance of A.) set forth the special circumstances of the agreement and covenants. 2 H. Bl. 4.

### (3 K 25.) Bar by way.

So, in bar of an avowry for damage feasant, the plaintiff may prescribe for a way. Vide Chimin, (D 2.)

And he must shew what way he claims in certain; as, whether it be for horses, *carucis*, &c. Vide Chimin, (D 2.)

And the *terminus a quo* and *ad quem*, &c. Vide Chimin, (D 2.)

### Replication.

To this bar the defendant may reply *de son tort*, and traverse the prescription.

Or, acknowledge the way, and say that the trespass was *extra viam*. Tho. Ent. 297.

If the defendant traverses the prescription, the plaintiff shall join issue upon the traverse.

If he pleads *extra viam*, the plaintiff may rejoin to it *non culp*. Tho. Ent. 297.

A plea in bar of an avowry for taking cattle damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must shew that they were passing on the highway when they escaped: it is not sufficient to state that being on the highway they escaped. 2 H. Bl. 527.

### (3 K 26.) By force of a warrant or commission, &c.

So, the defendant may make avowry by authority of the commissioners of sewers. Co. Ent. 293. a. Hern. 643. Bro. R. 417. Vide post, (3 M 23.)

By the st. 23 H. 8. 5. the defendant may avow generally that he took by authority of the commissioners of sewers for an assessment by such commission. Co. Lit. 283. a.

But, if the defendant waives the short pleading allowed by the statute, and shews the special matter, he must plead all things sufficiently, otherwise it will be bad. Sti. 12. Lut. 1180.

So, he may avow by virtue of a warrant to distrain for the poor's rate, pursuant to the st. 43 El. Lut. 1179.

Or, by authority of the st. 15 Car. 2. for regulation of the militia. Clift. 636.

So, by force of a warrant upon a conviction for fraud in the excise. Lev. Ent. 152.

[\*514]

A warrant of distress granted by two justices under stat. 9 Geo. 2. c. 23. which refers to stat. 12 Car. 2. c. 14. s. 45. on a conviction for selling spirituous liquors without a license, need not be under the seals of the justices; it is sufficient if it be under their hands. Willes, 411.

**[\*](3 K 27.) For an amerciament.**

So, the defendant may make avowry for an amerciament: as, for not appearing at a leet. Win. Ent. 873. (or 986. edit. 1680.) R. 3 Leo. 14. Mo. 89. Bend. pl. 227.

For departing, when sworn upon the homage, before verdict given. Co. Ent. 570. b.

For refusing to be constable. Co. Ent. 572. a. 5 Mod. 124.

So, for an amerciament for stopping a way, or other offence presented. Co. Ent. 573. a.

Or, for taking inmates.

In an avowry for an amerciament, the defendant must shew the leet or court, where imposed, to be duly held. R. Cro. El. 245.

And before whom. R. 1 Brownl. 198. Semb. 5 Mod. 96.

And over whom it has jurisdiction. R. Skin. 393.

That he had special notice of his election to the office for the refusal whereof it was imposed. R. 5 Mod. 130.

So, that there was good cause for the amerciament: as, that it was for an offence within the leet. R. Hob. 129.

And in replevin it is not sufficient to say that he was presented for such an offence, but he must aver directly that such offence was committed. 1 Sal. 107. Sho. 61. R. Cro. El. 885, 6. 3 Leo. 8. R. Carth. 74. R. F. g. 46. 108.

Otherwise in trespass. R. 1 Sal. 107. Sho. 61. Carth. 74. Skin. 587.

And *licet fuit cul.* is not a sufficient averment. F, g. 109.

If defendant avows in replevin; as, bailiff for an amerciament, he must aver that defendant was guilty, for here he is an actor; though in trespass it is not necessary, for there the conviction justifies the officer. Str. 847.

The amerciament must be by the court, not by the jury, and there must be an affeerment. Ibid.

So, he must shew an amerciament at a sum certain: for without that, an affeerment is not sufficient. R. Hob. 129.

So, he must shew that the amerciament was affeered by affeers. R. 3 Lev. 19. Adm. Mo. 89.

And he must shew the names of the affeers. R. Kel. 66. a.

So, the names of the suitors before whom presented. R. 3 Leo. 8.

Or, ascertained by the jury. Semb. F, g. 109.

So, he must shew the precept. 1 Sal. 108. Sho. 62. 3 Mod. 137. R. Mo. 573. 604. Semb. cont. Carth. 74. Acc. Skin. 587.

And where made. R. 1 Brownl. 198.

But if the amerciament is general, *ideo in misericordia*, and afterwards affeered, it is sufficient. R. 1 Sal. 56.

Or, if it is assessed at a sum certain. Per Holt, Sho. 62.

**(3 K 28.) For customs.**

So, he may make avowry for a customary demand: as, for a fine due by custom upon an alienation. 2 Vent. 132.

So, for a fine imposed by the leet, &c. for a contempt.

So, for a toll due by custom.



[\*]So, for a heriot due by custom. Co. Ent. 6. 13. a. Lut, 1310. Vide Copyhold, (K 23.)

Or, for heriot-service. 8 Co. 103.

So, for breach of a bye-law. Win. Ent. 900. (or 1014. edit. 1680.)

If defendant makes conusance, that he distrained for a forfeiture incurred by breach of a bye-law, he must set forth the bye-law. 3 Wils. 155.

But if the avowry is for a thing due against common right, a custom must be alleged to distrain for it. R. 1 Sal. 175. Vide Distress, (A 1.)

Yet where the avowry shews that the duty is due, it is sufficient, without alleging performance of that which was the consideration for the duty: as, if it says that a borough, in consideration of maintaining the port, shall have toll, &c., it need not allege that the port was in repair, for it is sufficient that they are bound to repair it. R. 1 Sal. 249.

Ancient custom means immemorial custom. Cowp. 17.

In pleading a custom that admits of exceptions, the exceptions must be noticed. Cowp. 62.

The modifications of a custom not inconsistent with the right claimed, need not be shewn in pleading it. 3 T. R. 264.

If a customary right is claimed as appurtenant to an ancient messuage, the antiquity of the messuage is, as a part of the custom, put in issue by a traverse of the custom. 5 T. R. 2.

### [(3 K 29. a.) Demurrer.]

A demurrer to a declaration in replevin, without adding a suggestion for a return, is no discontinuance. 2 N. R. 405.

### (3 K 29. b.) Judgment in replevin.—For the plaintiff.

If there be judgment for the plaintiff for want of a replication to the bar to the avowry, or upon a demurrer, a writ of inquiry of damages shall be awarded.

So, if the defendant, *relicta verificatione, cognovit actionem*, or there is judgment against him by *nihil dicit*, &c.

Or, at the request of the plaintiff, by the assent of the defendant, the justices may assess the damages without a writ of inquiry.

If the judgment is upon a verdict, the jury usually assess the damages. 2 Sand. 315.

Or, the jury after verdict may be dismissed, and damages assessed by the justices with the defendant's consent.

So, if the jury do not assess damages, the plaintiff may make a suggestion upon the roll that the cattle are still detained, whereupon a writ shall go to inquire of the value of the cattle and the damages, upon which the plaintiff shall have judgment for both.

A judgment "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," is good, either as a judgment at common law, though the return be not adjudged irreplevisable, or as a judgment under the stat. 21 H. 8. c. 19. which entitles the defendants to damages and costs. 4 T. R. 509.

[\*]If there is judgment for the plaintiff in replevin *qu. adhuc detinet* by default after appearance, there shall be a special writ of inquiry for the value of the cattle, or goods, and damages. F. N. B. 69. L. Co. Ent. 611. a.

But where the taking was lawful the damages shall be only for the detainer: as, in replevin by the lord for the goods of his villain, or for goods taken damage feasant, and detained after amends tendered. F. N. B. 69. F. G.

[\*516] [\*517]

(3 K 30.) For the defendant.

If there is judgment for the defendant upon a demurrer or verdict, or the plaintiff is nonsuited, the defendant shall have return irreplevisable. Vide post, (3 K 31.)

If the plaintiff is nonsuited, when the defendant avows for rent, the justices may assess damages without a writ of inquiry. 3 Leo. 213.

And by the st. 17 Car. 2. 7. on distress for rent on the lands chargeable, if the plaintiff in replevin, by plaint or writ depending in any court at Westminster, be nonsuited before issue, the defendant may make suggestion in nature of an avowry or conusance to shew cause of distress, and the court shall award a writ to inquire, &c. what arrear, and the value of the distress; of the execution of which fifteen days' notice shall be given to the plaintiff or his attorney.

By the same statute, on return of the inquisition the defendant shall have judgment to recover the rent-arrear, if the goods distrained amount to it; otherwise, to the value of the distress, with full costs, for which he may have execution by *fiери facias*, *elegit*, &c. 1 Sand. 195.

By the same statute, if the plaintiff be nonsuited after avowry, or conusance, and issue joined, or a verdict be for the defendant, the jury who were to try the issue shall inquire what arrear, and the value of the distress, and the defendant shall have judgment and execution *ut supra*.

So, by the same statute, if judgment be for the defendant upon demurrer, the court shall award a writ to inquire the value of the distress, and on return the defendant shall have judgment for the arrears mentioned in the avowry or conusance, if the distress amount to that value, otherwise to the value of the distress, and his full costs and execution *ut supra*.

If the avowry is for rent charge, as well as for rent-service, the jury shall inquire what rent was in arrear, and the value of the cattle distrained. Adm. 1 Lev. 255.

So, if the avowry is for the poor's rate or other duty, the jury shall inquire how much is due. Semb. 5 Mod. 76.

But if the jury omit inquiring what rent is in arrear, it cannot be supplied by a writ of inquiry; for it must be by the same jury who try the issue. R. 1 Lev. 255. 1 Sal. 205.

Yet, if the plaintiff is nonsuited, it may be supplied by a writ of inquiry. Semb. 5 Mod. 76. R. 5 Mod. 77.

It may be supplied by a writ of inquiry, where the avowry was for the poor's rate, and the plaintiff nonsuited. Sal. 205.

[\*]So, where at the trial the jury omits to assess the damages. 2 Bl. 291. 3 Wils. 442.

So, if the jury find the value of the distress, and not what rent in arrear, by which he cannot have judgment upon the verdict, yet if he thinks fit he shall have judgment at common law. R. Ray. 170. 1 Sid. 380.

If the jury find a verdict for him, and damages to the amount of the rent claimed in the cognizance, without finding either the amount of the rent in arrear, or the value of the cattle distrained, and judgment be entered for the damages assessed, the court will permit the defendant to amend his judgment, and to enter his judgment *pro retorno habendo*, after a writ of error brought. 3 T. R. 349.

If the plaintiff is nonsuited for want of plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for the damages. 2 Wils. 41.

If plaintiff is nonsuited for want of declaration, and *retorn. habend.* awarded, and

then plaintiff sues out writ of second deliverance, yet afterwards avowant may execute writ of inquiry of damages ; for though writ of second deliverance is superseas to *retorno. habend.* yet it is not to writ of inquiry. 2 Wils. 116.

If goods distrained are not replevied, but by consent of attornies remain in distrainer's hands, without writ of *re. fa. lo.* or appearance ; after verdict for plaintiff the court will set aside all proceedings. Barnes, 451.

A common law judgment in replevin *de retorno habendo* after verdict need not state that the return is to be irrepleviable. 4 T. R. 509.

Since a defendant in replevin (query if before avowry) is an actor as well as the plaintiff, he, like the plaintiff, may take down the record to trial without a proviso ; the plaintiff, therefore, can never be guilty of laches in not going to trial, so that there can be no judgment as in case of a nonsuit. 1 Blk. 375. 3 T. R. 661. 5 T. R. 400.

If there be judgment in replevin as well *de retorno habendo*, as that the avowant recover his arrears, &c., though the latter branch be void, from the jury not having pursued the directions of the st. 17 Car. 2. c. 7. yet it remains good as to the former, that being a complete judgment at common law. 4 T. R. 509.

An avowant shall pay costs on the special avowries found against him. Dougl. 709.

Semble, that if a plaintiff *e. gr.* in replevin succeeds upon any one issue, he is entitled to the costs of the verdict. 2 T. R. 825.

Where in replevin some issues are found for the plaintiff, some for the defendant, and the plaintiff is entitled to judgment, he is entitled to the costs of the trial deducting the costs of the issues found for the defendant, unless the judge certifies under 4 Ann. c. 16. s. 4. that the plaintiff had probable cause for pleading the matters on which those issues were joined. 2 T. R. 235.

The defendant in replevin, avows for rent in arrear, and that the goods had been clandestinely removed. The plaintiff pleads, 1. Non-tenure : 2. No rent in arrear : 3. That the goods were not clandestinely removed. The last issue only was found for the plaintiff. Held, that the defendant was entitled to deduct from the plaintiff's costs, the costs of the two first issues which were found for the defendant. 1 Mars. 234. 5 Taunt. 594.

As well against a third person, the owner of goods distrained, as the lessee himself, the lessor is entitled to double costs, under stat. 11 Geo. 2. c. 19. 1 Taunt. 210.

To entitle the defendant to double costs, under st. 11 Geo. 2. c. 19. it is not necessary that the judge should certify, nor that a suggestion should be entered, even where general issue only is pleaded. 1 Taunt. 210.

It seems that the provision in st. 11 Geo. 2. c. 19. giving double costs to [\*]an avowant in replevin, only extends to avowries under a tenure ; at least it does not extend to an avowry for rent decreed to be paid by commissioners under a canal act, to the owner of land taken for the purposes of the act. 7 T. R. 500.

The stat. 11 Geo. 2. c. 19. does not extend to an avowry for a rent charge. 1 N. R. 56.

Where, by a canal act, the company were authorised to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross ; and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums ; an avowant stating a distress under this act of parliament, was holden not to be entitled on obtaining a verdict to double costs, under the stat. 11 Geo. 2. c. 19. 1 B. & P. 213.

One of two defendants in replevin cannot have his costs upon acquittal. 3 Burr. 1284. 1 Blk. 355.

Where judgment is given on demurrer for the avowant in replevin, fifteen days notice of executing the writ of inquiry should be given to the plaintiff, as in case of nonsuit, on 17 Car. 2. c. 7. 1 Mars. 444. 6 Taunt. 57.

In replevin, if the jury at the trial omit to assess the defendant his damage under avowry for a poor's rate, a writ of inquiry shall issue. 3 Wils. 442. 2 Blk. 921.

If the jury find for the avowant on issue taken to an avowry for rent, they may award him damages under 21 Hen. 8. c. 19. s. 3., to which he will be entitled, unless he takes judgment under the st. 17 Car. 2. c. 7. 4 T. R. 509.

### (3 K 31.) Execution.

After judgment for the defendant, by the common law, a writ *de retorno habendo* was awarded, which was irreplevisable.

Where the judgment was upon a demurrer, or after verdict. 14 H. 7. 6. b.

But if the judgment was upon a nonsuit before verdict, he shall have return, but not irreplevisable. Ibid. 34 H. 6. 5. a.

If upon a writ *pro retorno habendo* the sheriff cannot find the cattle, there shall be a *capias in withernam* upon the return of *elongata*. 2 Leo. 174.

So, if after *withernam* in process the defendant in *homine replegiando* found bail and pleaded, and there is judgment against him and he is surrendered, he shall be detained upon the first *capias in withernam*. R. Sal. 582.

Or, if he does not surrender himself, another *capias in withernam* shall issue against him. R. Sal. 582.

But, after *withernam* upon a *retorno habendo*, if the defendant tenders in court the damages assessed by the jury, and also a fine for his contempt, the proceedings upon the *withernam* shall be stayed. R. 2 Leo. 174.

Proceedings in replevin will only be stayed on payment of costs up to the time of application, though after the distress and before replevin the arrears and costs then incurred were tendered. 1 B. & P. 382.

Since the avowant in replevin is an actor, he cannot apply to stay proceedings. 3 B. & P. 603.

So, after judgment for return irreplevisable, if the owner of the cattle or goods tenders all that is due upon the judgment, and it is accepted, there shall be a writ of delivery for the goods. 2 Inst. 107.

[\*]So, if he tenders the whole upon the judgment, which is ascertained by the avowry, and is refused, he shall have *detinue*. Ibid.

In replevin in county-court, removed by *recordari*, and verdict for avowant, and inquiry as to the value, pursuant to st. 17 C. 2. c. 7. the avowant shall not have the replevin bond delivered to him to sue the parties; but must either have judgment and execution for the sum settled by the jury pursuant to that statute, or he must take the ancient remedy, which is, to have writ to *de retorno habendo*: and if sheriff returns *averia elongata*, then a writ to have *return* of the beasts of the pledges; and if that returned *nihil*, then *sc. fa.* against the sheriff *quod reddat ei tot. averia*. B. R. H. 352.

### (3 K 32.) Recaption.

So, if pending replevin for a former distress the lord distrains his tenant again for the same cause, he shall have a recaption. F. N. B. 71. E.

To recaption the defendant does not avow as in replevin, but justifies; for the plaintiff shall not recover damages for the taking or detaining of his cattle, but only damages for the defendant's contempt against law. 1 Rol. 320. l. 10.

{ Of damages, generally, vide *Thompson v. Button*, 14 Johns. Rep. 84. *Bruce v. Learned*, 4 Mass. Rep. 614. *Mattoon v. Pearce*, 12 Mass. Rep. 406. *Arnold v. Bailey*, 8 Mass. Rep. 145. *Loomis v. Tyler*, 4 Day, 141. }

## (3 L) PLEADING IN SCIRE FACIAS.

### (3 L 1.) When it lies.—By the common law.

By the common law a *scire facias* lies after a year and a day after judgment

given in a real action, to execute such judgment. 2 Inst. 469. Adm. 1 Sal. 258. Vide Execution, (14.)

So, to execute a fine. 2 Inst. 470. Vide Execution, (A 6.)—Fine, (E 15.)

And upon a judgment in ejectment. R. Sal. 258. 600. Ld. R. 806.

On a judgment against the casual ejector, a *sci. fa.* lies against any person who may get into possession of the land after the judgment, and before execution. Ld. R. 669.

Such *sci. fa.* may either suggest the name of such person. D. Ld. R. 670.

Or be generally against the terretenant. Ibid.

But where the ejectment is defended, the *sci. fa.* ought to be against the defendant and terretenants also. Semb. Ld. R. 808.

So, in annuity. 1 Sal. 258. 600. Vide Ld. R. 808.

So, in personal actions, if the plaintiff or defendant die within a year and a day, there cannot be an execution before a *scire facias* by or against the executor or administrator. 1 Rol. 900. l. 15. 20. { Vide Daniel v. Robinson's Exr. 1 Wash. 154. Wood v. Webb, Ibid. in nota. Scott v. Adams, 3 Hen. & Munf. 501.

So, where both the plaintiffs in error die, *scire facias* must issue in the names of the executors of both. Boswell v. Jones, 1 Wash. 325. }

So, if one plaintiff die, the survivor shall not have execution before a *scire facias*. Mo. 367. R. Cont. Noy. 150. { Vide Berrybill v. Wells, 5 Binn. 56. }

The survivor shall not have an execution by *elegit*, for the heir shall be contributory. Per Holt, 1 Sal. 320.

So, if a recognizance is given for good behaviour, he cannot be indicted for a breach of the recognizance before a *scire facias* upon it; for he may have a plea for his excuse. 1 Rol. 900. 5.

So, a *scire facias* lies upon a judgment in annuity. Per Holt, Sal. 600.

So, if a conusee dies, his executor cannot sue upon the recognizance, to have an *elegit*, without a *scire facias* against the conusor, though it is within the year. F. N. B. 267. D.

[\*]Nor, if the conusor dies within the year, against his executor, heir or terretenant. Ibid.

But by the common law a *scire facias* does not lie in personal actions after a year and a day after judgment. 2 Inst. 469. Dub. per Holt, Sal. 600.

Nor, upon a recognizance acknowledged. 2 Inst. 469.

So, it is not necessary where the king was plaintiff. Sal. 603.

{ A *fi. facias* may be issued against the goods, &c. of a defendant discharged under the insolvent act, at any time afterwards, without reviving the judgment. Gonnigal v. Smith, 6 Johns. Rep. 106.

So, if an execution has been issued within the year, whether it has been returned or not, the plaintiff may, by continuing it on the roll have another execution without a *scire facias*. Gonnigal v. Smith, 6 Johns. Rep. 106. Vide Jackson v. Stiles, 9 Johns. Rep. 391. Lewis v. Smith, 2 Serg. & Rawle, 142. Cowan v. Shields, 1 Tenn. Rep. 64.

And, if the plaintiff who sues out a *sci. fa.* to revive a judgment, does not proceed upon it, or if after judgment, he does not sue out execution within a year and a day, it is discontinuance. Vanderheyden v. Gardenier, 9 Johns. Rep. 79.

So, if an execution is delayed for more than a year and a day, by the consent of the defendant, or by an injunction, &c. the plaintiff may take out execution without a *scire facias*. United States v. Hanford, 19 Johns. Rep. 173. Vide cont. Hester v. Burton, 2 Hayw. 136. Gibbes v. Mitchell, 2 Bay, 120.



So, when a judgment or decree is suspended, by the terms of it, till a further day, an execution may issue at any time within a year and a day after the suspension expires, without a *sci. fa.* Long v. Morton, 2 Marsh. 39.

If an execution issue after a year and a day, without a *sci. fa.* it is only voidable. Jackson v. Bartlett, 8 Johns. Rep. 281. 2d edit. Vide Jackson v. Delancy, 13 Johns. Rep. 537. Vastine v. Fury, 2 Serg. & Rawle 426.

If a judgment be of more than 10 years standing, it cannot be revived without affidavit that it is unsatisfied. Lansing v. Lyons, 9 Johns. Rep. 84. Bank of New-York v. Eden, 17 Johns. Rep. 105.

If the judgment be of more than 20 years standing, the court have a discretionary power to grant or refuse a motion for a *scire facias*. Bank of New-York v. Eden, *ut supra*. }

(3 L 2.) By the st. W. 2. 45.

Yet, by the st. W. 2. 45. a *scire facias* was given to have execution upon a judgment in personal actions after a year and day. Co. Lit. 290. b.

And by the same statute a *scire facias* lies after the year and day upon a recognizance. 2 Inst. 470.

But a *scire facias* is necessary where the judgment is superseded by error, though the year and day pass. Vide post, (3 L 4.)

So, it is not necessary where no alteration of parties is made; as, if one plaintiff dies after judgment, execution may be sued in the name of both without a *scire facias*. Noy, 150.

So, if error is sued and judgment affirmed, and afterwards one of the plaintiffs dies. R. Mo. 367. Adm. 5 Mod. 339.

So, if one plaintiff dies, the survivor alone may sue out execution, without a *scire facias*; for he is party to the judgment. Cont. Mo. 367. R. acc. Noy, 151. Adm. Sho. 404. Adm. Cart. 194.

So, if error is brought by several defendants, and afterwards one dies, whereby the error is abated, execution may be sued against the others, without a *scire facias*. Dub. Sho. 404. Semb. 5 Mod. 339. 1 Sal. 319.

So, if two sue execution by *scire facias*, and one dies after an *elegit* awarded, the survivor shall have an *alias elegit* without a *scire facias*. R. Cart. 113. 123. 180. 194.

Yet where judgment is given and execution delayed beyond the year and day by injunction in Chancery, there must be a *scire facias*. R. 1 Sal. 322.

If execution is sued after the year and day without a *scire facias*, the execution shall be superseded upon motion. Mod. Ca. 288.

But if execution is sued after a year and day without a *scire facias*, it is not void but voidable by error. R. 3 Lev. 404. 1 Sal. 261. R. cont. 4 Leo. 197.

A *scire facias* lies of course within 10 years after judgment; but after ten years it must be upon motion. Pr. Reg. 209.

(3 L 3.) *Scire facias* upon judgment.—How it shall be sued.

A *scire facias*, though it is but a judicial writ, is in the nature of an action, and a release of actions or of executions discharges it. Co. Lit. 290. b. [2 T. R. 46.] Vide Bail, (R 1, &c.)

It is a personal action, and therefore requires bail on a writ of error. 2 Bl. 1227. 2 Ld. Raym. 1048. 1253.

A *scire facias* to revive a judgment entered on a bond for securing an annuity granted before the 17 G. 3. c. 26. s. 2., commanding that no action [\*] shall be  
[\*522]

brought on any judgment altered, (unless certain requisites were complied with,) is an action within that clause. 1 T. R. 267.

And a plea to a *scire facias* must conclude "if the plaintiff ought to have or maintain his action." Ibid. 2 Wils. 251.

And a *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors on the *sci. fa.* being brought against them. 1 T. R. 388.

If it is to have execution of a judgment, the judgment must be entered upon record before the *scire facias* sued; and it is not sufficient that it is signed by the officer. Per Glinn, Pr. Reg. 494.

If judgment was given ten years before, it shall not be awarded without motion in court. Pr. Reg. 495. Sal. 598. { Vide *Lansing v. Lyons*, 9 Johns. Rep. 84. *Bank of New-York v. Eden*, 17 Johns. Rep. 105. }

And the record of the judgment must be in court; for it is the foundation and warrant for the *scire facias*. Pr. Reg. 495.

If it was seven years before, there must be a motion at the side bar. Sal. 598.

If after judgment revived by *scire facias*, the defendant dies before execution, there shall be another *scire facias* without motion. Ibid.

A *scire facias* against a defendant says *in hac parte*. Sal. 599.

Against the bail it says *in ea parte*. Ibid.

The *scire facias* must be sued in the same court where judgment was given, if the record remains there. { Vide *Jarvis v. Rathburn*, Kirby, 220. *Johnson v. Randall*, 7 Mass. Rep. 340. *Commonwealth v. Downey*, 9 Mass. Rep. 520. } Vide Execution, (I 1.)

And to the sheriff of the same county where the original action was. Pr. Reg. 495. R. Hob. 4. Yel. 218.

And upon return of *nulla bona* in the same county, there may be a *testatum scire facias* to the sheriff of another county. 2 Leo. 67.

But if a debt, after recovery in B. is assigned to the king, a *scire facias* may issue out of the Exchequer. Ibid.

A *scire facias* ought to be as short as possible. Pr. Reg. 496.

And therefore it is sufficient, though it be as general as the record upon which it is founded. Mod. Ca. 296.

And an immaterial variance from the record does not prejudice; as, an omission in the style of the king. R. 3 Mod. 227.

So, *scire facias executor*. of such an one is sufficient, without naming him. 1 Leo. 17.

But it must recite the judgment that was given. Cro. El. 817.

And before what judge. Pr. Reg. 497. R. Sal. 517.

If the record is special, it is safe to recite it as it was pleaded. Dy. 34. b.

It must be against all the defendants together. R. Sal. 598.

A *sci. fa.* against two, "that they severally be and appear to shew cause," &c. on a bond to the crown executed by three, is bad. 3 Anst. 811.

*Scire facias* against two on a joint and several recognizance of four to the crown, without averring the others to be dead. This may be objected to without a plea in abatement. 2 Anst. 443.

A *scire facias pro valore et dampnis* upon a judgment in dower must mention the recovery of seisin. Off. Br. 303. 305.

By the st. Mert. 1. she may recover the value and damages, *usque diem quo seisinam recuperavit*. 2 Inst. 80.

If a recognizance was taken before a judge, and not entered in [\*]court and the plaintiff declares upon a recognizance in court, it is variance. R. Sal. 564. 659.

[\*523]

And such variance cannot be amended. R. Sal. 52.

If the *scire facias* be upon a judgment in ejectment for two messuages where the judgment was of one messuage. Ibid.

So, it ought to conclude, *quare executio fieri non debet*; and therefore if *non debet* is omitted, it is bad. Lut. 1282.

If the judgment be against two and one dies, it shall be against the survivor, *quare* execution against his goods, and a moiety of his lands, and against the heir and terretenants of the deceased, *quare* execution against them for a moiety of his lands *habere non debet*. R. Carth. 107.

If defendant dies after writ of inquiry executed, and before the return, and the *sci. fa.* is to shew cause why new writ of inquiry should not be awarded, it shall be quashed; for it should be to shew cause why the damages assessed should not be recovered. R. on demurrer, C. B. B. R. H. 1 Wils. 243.

If it be by an executor, it must make a *profert* of the letters testamentary in the middle or at the end. R. Carth. 69.

But a *scire facias* against terretenants need not shew by what title they entered. R. 1 Lev. 312.

It need not recite all the proceedings upon which the judgment was given, but the judgment only. R. Carth. 149.

The term of the recovery need not be inserted. Barnes, 431.

The *scire facias* must not be tested on a Sunday; for it is not *dies juridicus*. Dy. 168. a.

There ought to be seven days between the *teste* and return of every *scire facias*; and therefore fourteen days between the *teste* of the first and return of the second *scire facias*. R. 2 Jon. 228. R. 9 W. 3. B. R. (Com. 53.) Sal. 599. Skin. 633.

So, a *scire facias* must be delivered to the sheriff four days at least before the return. 2 Jon. 228. [4 T. R. 583.]

A convenient time. Sal. 599.

If it has lain four days in the office, summons upon it may be made any time before the court is up, on the return-day. Str. 644.

The sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned, so late on the return-day that they could not bring in their principal before the rising of the court. 2 T. R. 737, 738. n.

By rule in B. R. the second *scire facias* ought not to be sued out till the first is returned. Sal. 599. Cont. Skin. 633.

Declaration may be entitled of the term generally, though the *sci. fa.* is returnable the last return. 3 Wils. 154. 2 Blk. 735.

It may be quashed on plaintiff's motion, after appearance, without costs. Barnes, 431.

No execution can be sued out on a *sci. fa.* to revive an old judgment, till a *scire feci* is returned, or an affidavit of personal notice to the defendant be produced. 2 Blk. 1140.

But one may agree not to insist upon a *sci. fa.* to revive a judgment against him after the year has elapsed; and execution sued out without a *sci. fa.* will then be good. 2 Smith, 66.

Judgment was entered on a warrant of attorney given with a bond to secure an annuity payable quarterly, and the arrears levied. On a second quarter becoming due, a second *sci. fa.* was issued, without reviving the judgment; and held regular. 1 H. B. 297.

{ *Scire facias* to have execution, must follow the original judgment. Wilcox v. Mills, 4 Mass. Rep. 218.

A *scire facias* will lie for a new execution, where the former execution was, by mistake, unlawfully levied and satisfied, and the creditor had been compelled to refund the money. Stoyel v. Cady, 4 Day, 222. }

## [\*](3 L 4.) Upon what judgment.

A *scire facias* lies *quare executionem non* upon every judgment, upon which execution is not sued within a year and a day, if the judgment was not given with a *cesset executio* to such a time, for then the year shall be computed from that time. Mod. Ca. 288. } Vide Dunlop v. Speer, 3 Binn. 169. }

Though execution be sued in part. Lut. 1264.

So, though execution is sued, but not continued for a year and a day. 2 Leo. 77, 78. Carth. 2.

It lies upon a judgment in a real action. Vide Execution, (A 4.)—(I 4.)

Upon a judgment in ejectment, where a stranger enters after judgment. R. Lut. 1268. 3 Lev. 100. Clift. 676, 7.

So, it lies upon a judgment *quod computet*. 1 Vent. 258.

So, if error is brought of the judgment after the year, which is quashed and void, there ought not to be execution, without a *scire facias*; for the writ of error being void, does not revive the judgment. R. 1 Rol. 899. l. 40.

So, if there is an injunction out of Chancery, whereby execution is stayed for a year, there shall not be execution afterwards without a *scire facias*. R. Mod. Ca. 288.

If on judgment of Michaelmas term, execution is stopt by injunction, and afterwards taken out tested the last day of the subsequent Michaelmas term; it is irregular, without *sci. fa.* A writ of error is matter of record, which the court can take notice of but an injunction is not. Str. 301.

Therefore it is not necessary, where the judgment was suspended by error, though a year and a day are passed before judgment affirmed. R. Cro. El. 416. 706. R. 1 Rol. 899. l. 20. R. 1 Sal. 261. R. Lane, 20. R. Godb. 372.

Nor, where the judgment is affirmed within the year, though the execution is sued out of the court where the judgment is affirmed. R. 5 Co. 88. a. Cont. Pr. Reg. 208.

Nor, where the judgment is affirmed, or the plaintiff is nonsuited, or discontinues in error, though the year was expired before error brought. R. 1 Rol. 899. l. 25. 35. R. 2 Cro. 364. Lane, 20.

If a delay of execution for a year has arisen from the defendants by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*; and if a rule to shew cause why it should not be set aside is obtained, the court will discharge it with costs. 2 B. M. 660.

## (3 L 5.) By whom.

After the year and day a *scire facias* lies between the same parties as were parties to the judgment. Thes. Br. 224.

If the plaintiff dies, *scire facias* lies by his executor or administrator within a year. 2 Inst. 395. Th. Br. 240. Vide Execution, (E).

If the judgment is by an executor or administrator *durante minori ætate*, the executor at his full age may have *scire facias*; for he is privy to the judgment. R. 1 Rol. 889. l. 2.

[\*]Or, by an executor, upon condition that upon such an act B. shall be executor. Dub. 1 Rol. 889. l. 5.

So now, by the st. 17 Car. 2. 8. if an executor or administrator obtains judgment, and dies before execution, and administrator *de bonis non*, &c. shall have a *scire facias* upon such judgment. Vide Administration, (G).

So, if he dies after the money levied by the execution, and it remains in the sheriff's hands, he may perfect the execution. R. 1 Sal. 323.

If an executor bring a *scire facias* on a judgment or recognizance, and obtain [\*524] [\*525]

judgment *quod habeat executionem*, and die intestate, the *administrator de bonis non* must bring a *scire facias* on the original judgment, and cannot proceed upon the judgment on the *scire facias*. Semb. *Ld. Raym.* 1049.

If the plaintiff in an action, after judgment and a writ of error allowed, become bankrupt, his assignees cannot sue out a *sci. fa.* in their own names to compel an assignment of errors, till some judgment be given; and then it must be done immediately after such judgment; but they should go on with the writ of error in the bankrupt's name till judgment. 1 T. R. 463. Vide 3 T. R. 437.

The husband cannot have execution for the costs on a plea of coverture found for the defendant, without a *scire facias*. *Doug.* 637. (614.)

< Where one plaintiff dies after judgment, the survivor may have execution without *sci. fa.*, upon suggesting the death on the record, or stating it in the writ; *secus*, if the survivor be a feme, who afterwards takes baron. *Berryhill v. Wells*, 5 Binn. 56. >

### (3 L 6.) Against whom.

So, if defendant dies after judgment, a *scire facias* lies within a year against his executor or administrator. *Lut.* 1273, 4. *Th. Brev.* 241.

So, in ejectment it lies against an executor and a stranger who entered after judgment. *R. Lut.* 1266. 3 *Lev.* 100. Vide ante, (3 L 4.)

Or, against terretenants generally, or by special name. *Sal.* 600. *Ld. Rd.* 670.

{ But terre-tenants need not be made parties in a *sci. fa.* against the original defendant. *Jackson v. Shaffer*, 11 *Johns. Rep.* 513. }

If it be against *A. tenen. præmissorum*, it shall be intended tenant at the time of the *liberate*. *R. Jon.* 90.

So, if judgment is recovered against an executor or administrator who dies, a *scire facias* lies upon it against the *administrator de bonis non*, &c. being also administrator of the executor. *R. per three J. Jon.* 214. *R. 1 Rol.* 890. l. 35. *Cro. Car.* 167.

So, against the executor of an administrator against whom the judgment was given, if he has wasted the goods of his intestate. *Clift.* 679.

{ Terre-tenants, &c. must be made parties to a *scire facias* to revive a judgment which is a lien upon the land, after the death of the original party. *Morton's Exrs. v. Ter-tenants of Croghan*, 20 *Johns. Rep.* 106.

*Scire facias* need not be taken out against terre-tenants, previous to an execution against lands in the hands of the alienee, where the defendant has aliened before execution. *Young v. Taylor*, 2 *Binn.* 218.

Nor is a *scire facias* against assignees, necessary, where the debtor is insolvent, and remains in possession by permission of his assignees. *Clark v. Israel*, 6 *Binn.* 391. }

### (3 L 7.) When it does not lie.

But a *scire facias* does not lie where there wants privity; as, by an *administrator de bonis non*, &c. and upon a judgment by an executor or administrator till the st. 17 *Car.* 2. 8. *Jon.* 248. Vide ante, (3 L 6.)—Administration, (G).

Nor, by the heir, where his ancestor had sued an *elegit*. *R. Lane*, 16.

Nor, by the administrator of an administrator upon a judgment by his intestate, for a debt due to the first intestate; though the debt is [\*]brought into court he cannot take it; though he also obtained judgment by mistake, for it is erroneous. *Latch*, 140.

So it does not lie, though there is privity by him who has no interest in the thing recovered: as, if husband and wife recover land in right of the



wife, and the wife dies, the husband shall not have a *scire facias* upon the judgment. Jon. 248.

So, if husband and wife as executrix or administratrix recover. R. Jon. 248. 1 Rol. 899. l. 10. Vide Baron and Feme, (Z.)

Yet, where husband and wife have a judgment for a debt to the wife, the husband alone shall sue execution without a *scire facias*. R. Mod. 179. Vide Baron and Feme, (E 3.—Z.)

So, it does not lie against the heir and terretenants of the tenant in dower, after judgment against him and seisin awarded, if he dies before inquiry of damages. R. 3 Lev. 275.

Nor, by the administrator of the demandant in dower, if she dies before damages and costs assessed. Dub. Ibid.

### (3 L 8.) Judgment in *scire facias* upon default.—When without two *scire faciases*.

If upon a *scire facias* the sheriff returns *scire feci*, and the defendant makes default, there shall be judgment against him.

But execution will not be permitted to issue on a *sci. fa.* to revive an old judgment, till a *scire feci* returned or an affidavit of notice. 2 Bl. 1140.

So, in C. B. if a *scire facias* goes upon a judgment for debt and damages against the defendant himself, who was party and privy to the judgment, and the sheriff returns *nihil*, and the defendant makes default, there shall be judgment against him without awarding a second *scire facias*. Dy. 168. a. 2 Inst. 472. Sal. 599.

### (3 L 9.) When not.

But in all cases where the sheriff returns *nihil* upon a *scire facias* in B. R. another *scire facias* shall be awarded. 2 Inst. 472. 2 Mod. Ca. 227.

And if upon the second *scire facias* the sheriff returns *nihil*, and the defendant does not appear, there shall be judgment against him. Dy. 168. a. 198. a. 172. a. 201. a.

So, in a *scire facias* upon a recognizance in C. B., there shall not be judgment against the defendant upon his default till two *nihil*s are returned. Dy. 168. a.

Nor, in a *scire facias* upon a judgment in C. B. where the defendant was not party to the record; as, if it be against an executor or administrator, &c. Ibid.

So, if the defendant after judgment takes husband, and the *scire facias* is against her husband and her. Per C. B. P. 9 An.

Nor, in a *scire facias* in C. B. for any cause, except upon a recovery for debt and damages against a party to the record. Dy. 168. a.

As, if *nihil* is returned upon a *scire facias* against a conusee after judgment in *audita querela* to be relieved from a recognizance by an infant, there must be a second *scire facias*. R. 2 Cro. 59.

So, if the *scire facias* is against two, and the sheriff, as to one, returns [\*]*scire feci*, and *nihil* as to the other, there shall be a second *scire facias* against both. Per tot. cur. 1 H. 4, 5. a.

If there is judgment against the defendant by default after a *scire feci* returned, he is without remedy, though there was no judgment originally given. R. 1 Lev. 41.

So, if the *scire facias* is against an heir, who, being warned, suffers judgment by default, he shall have no remedy in law, though his father was only tenant for life, remainder to him in fee. Ibid.

So, if the remainder was to him in tail. R. 1 Lev. 41. 1 Sid. 54. Ray. 19.

So, in any case, where he has matter pleadable to the *scire facias*. 1 Sal. 264.

But after judgment upon two *nihils* returned, the defendant may be relieved upon motion without an *audita querela*. 1 Sal. 93. 264.

After two *nihils* and *scire fieri* inquiry, *devastavit* returned, and traversed; if the defendant does not apply in a reasonable time, the court will not relieve on motion. Str. 1075.

(3 L 10.) Pleas to a *scire facias*.—What are allowed.

To a *scire facias* the defendant may plead in abatement or in bar. 2 Inst. 470.

But he can plead nothing in bar which he might have pleaded to the original action. Cowp. 728. { Vide *M'Farland v. Irwin*, 8 Johns. Rep. 61. 2d edit. *Wilcox v. Mills*, 4 Mass. Rep. 218. }

To aid, receipt, and age, shall be allowed. 2 Inst. 470.

But process of summons, attachment, and for a view, are ousted by the st. W. 2. 45. Ibid.

So, essoin of the tenant, defendant, prayee in aid, or plaintiff himself. Ibid.

So, protection shall not be allowed. Ibid.

So, the defendant cannot plead matter contrary to the title upon which the recovery was obtained. Ibid.

Nor, a thing which proves the judgment only erroneous and voidable. Ibid.

Nor, error pending of the same judgment. 4 Mod. 248. Semb. cont. Sho. 186.

If defendant pleads to *sci. fa. quare*, &c. that plaintiff should not have his action, (instead of execution,) it is well enough. 2 Wils. 251.

{ On a *scire facias* to revive a judgment, no other defence can be made, than that which denies the original judgment altogether, or shews, that it has been discharged: The merits of the original judgment, can in no case, be inquired into. *Cardesa v. Humes*, 5 Serg. & Rawle, 68. Vide *Emmett v. Stedman*, 2 Hayw. 15. *Ballard v. Averitt*, 1 Tay. 69. Anon. 2 Hayw. 110.

So, on a *sci. fa.* on judgment, under the plea of payment, evidence of payment to the sheriff, on a *ca. sa.* is inadmissible. *Boyce v. Young*, 3 Har. & M'Hen. 84. }

(3 L 11.) To a *scire facias* upon a judgment.—In abatement.

And therefore to a *scire facias* upon a judgment the defendant may plead in abatement, that there are not fifteen days between the teste and return. Lut. 25. Vide Abatement, (H 14.)

*Quod non tenet* specially: as, that he has only for years. R. 3 Lev. 205. Co. Ent. 620. 624. a. Vide Abatement, (F 13.)

But general non-tenure is no plea. R. 3 Lev. 205. Yet it was pleaded generally, though nothing done upon it. 2 Sand. 12. R. no plea. Cro. El. 872. R. Sal. 601.

So, where tenants are returned tenants of several parts, they cannot join in a plea of seisin in another. R. Sal. 601.

So, they cannot plead non-tenure by implication: as, that such a one is seised of the freehold. Ibid.

[\*] That he holds jointly with B. R. Mo. 524.

That there was no *scire facias* against the other defendant. Sal. 598. R. 2 Cro. 506. 507.

That there are other terretenants not named. R. 2 Sand. 8. 23. R. Mo. 525.

Or, if the return does not say that A. B. &c. are all the terretenants, it is bad. R. Sal. 598.

That there are terretenants in another county against whom there is no *scire facias*. R. 2 Vent. 104. Clift. 672.

But such plea shall conclude *si respondere debet*; for it is not directly in abatement. 2 Sand. 8. R. 2 Vent. 105. R. Sal. 601. Mod. Ca. 236.

A plea to a *scire facias* against the heir and terretenants of the recoverer, that there are other terretenants not returned, is a dilatory plea within 4 & 5 Ann. c. 16, and requires to be verified by affidavit. Forrest, 139.

And if it be that there are other terretenants in another county, it shall not say, not named, nor returned. R. 2 Vent. 105.

So, this plea, after a plea in bar, does not avail. Jon. 319.

Upon such plea the plaintiff may take a new writ against other terretenants. 2 Sand. 23.

### (3 L 12.) In bar, by an executor or administrator.

So, to *scire facias* against an executor or administrator, the defendant may plead in bar that he had fully administered *die impretrationis* of the *scire facias*. Off. Br. 253. 2 Sand. 220. Vide ante, (2 D 9.)

A *scire facias* on a judgment must pursue the terms of the judgment. And therefore where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must pray execution of such assets only as have come to the executor's hands since the former judgment; and if it prays execution of assets generally, without confining it to that time, it cannot be supported. 6 T. R. 1.

*Ne unques executor*. Mod. Int. 367.

So, judgment against him upon a prior *scire facias*, upon a *scire fieri* inquiry and *devastavit* returned. Cro. El. 886.

Or such prior *scire facias* pending, and no subsequent assets. Ibid.

But *plene administravit* and *nulla bona* will be bad upon a special demurrer. R. 4 Mod. 296. 1 Sal. 296. Semb. Al. 48. Off. Br. 302. R. Cro. El. 575. He ought to plead, nothing in his hands. Skin. 565.

So, he may plead *nul tiel record*. Mod. Int. 368. Vide ante, (2 W 13.)

So, by the st. 4 & 5 An. 16. payment, if the defendant has paid the money due on such judgment.

So, a thing which shews the writ to be mistaken: as if a *scire facias* upon a judgment against A. and B., is brought against the administrator of B. as survivor, the defendant may say that A. survived. R. 1 Sal. 262.

So, he may plead a release to the testator or himself. 3 Lev. 272. Vide ante, (2 W 30.)

[\*] Or, a release by the executor of the plaintiff.

Or, by one executor or administrator, or, to one executor or administrator. 3 Lev. 272.

But it is no plea, that by deed the plaintiff agreed that, if he obtained judgment, he would not take out execution if the defendant paid 100*l.*, which money he has paid; for there can be no defeazance of a judgment before it is given. R. Cro. El. 837.

It is no plea in a *scire facias* upon a judgment against himself, that there is another judgment against the testator unsatisfied; for he might have pleaded it to the first action against him. Dy. 80. a. in marg. R. 1 Sal. 315.

[\*529]

That the bond, upon which the judgment was obtained, was upon an usurious contract. R. 1 Sid. 182.

So, he may plead outlawry of the plaintiff before the first judgment in battery, &c. ; for though it was no bar to the action, because the damages were uncertain, yet it shall be a bar to the *scire facias* when the judgment has ascertained the damages. R. Jon. 239.

So, he may plead that the plaintiff's testator became *felo de se*. 1 Sand. 355.

That error is depending upon the original judgment. Skin. 590.

So, he may plead that the plaintiff levied debt and damages by *fieri facias* against the testator. Clift. 675. R. 4 Leo. 194. Cro. Car. 328.

But it is no good plea, that the plaintiff levied part by *fieri facias*, and agreed to accept 10*l.* at such a day for satisfaction of the residue, which was paid accordingly ; for payment is no plea to a debt upon record. R. 3 Lev. 119. Lev. Ent. 164.

*Quod testator cepit per ca. sa.* in execution, and afterwards permitted him *ire ad largum*. Off. Br. 300. Sal. 271.

That he obtained judgment in C. B. upon the same judgment. R. Cro. El. 7, 8.

So, it is no plea, *quod cepit testator. per ca. sa.* who died in execution. Off. Brev. 245.

That he paid the money recovered without acquittance. Jon. 326, 7.

### (3 L 13.) By an heir.

So, to a *scire facias* against an heir, he may plead, *riens per descent*. Semb. Dy. 334. Cro. Car. 295.

Or, pray that the parol may demur, if the heir is within age. 2 Inst. 396. Cro. Car. 295.

And if it is found against the heir, there shall be execution against him for a moiety only, and not for the whole ; for the heir is charged only as *terretenant*. R. Cro. Car. 296. 313. R. Jon. 87. Poph. 154.

If there are several heirs, as *parceners*, in *gavelkind*, &c. and a *scire facias* is against one only, he shall have contribution against the others. 8 Co. 12. b.

So, if part of the land descended to the heir of the part of the father, other part to the heir *de parte matris*. 3 Co. 13. a.

[\*]But, it is no plea, that before the *scire facias* the heir levied a fine to the use of himself in fee. Semb. Co. Ent. 622. b.

So, if the heir alone is charged, he shall not have a *scire facias* against a purchaser. R. 3 Co. 12, 13.

So, if there be a *scire facias* against an heir, or *terretenants*, after judgment against the ancestor, he shall not plead any matter in avoidance of the judgment, though the judgment was by *nil diuit* : as, that A. for whose sufficiency the ancestor was bound, was sufficient. R. Sav. 25. b.

• So, if judgment be against A. and B. and one dies, a *scire facias* lies against the survivor ; and it is no plea that the deceased has an heir to whom assets descended. R. 1 Lev. 30.

So, if the *scire facias* be against both, he may take execution, after judgment against both by *elegit*, or by *fieri facias* against the survivor only. 1 Lev. 30.

### (3 L 14.) By *terretenants*.

So, to a *scire facias* against a *terretenant*, he may plead in bar any thing

which shews his lands not liable to execution : as, that the defendant in the original action enfeoffed himself, or others, under whom he claims, before the judgment, with traverse of the seisin *tempore judicii aut unquam postea*. Off. Brev. 251.

If there be a traverse of the seisin and issue thereon, he shall be adjudged to be seised, though he made a feoffment, if it was with an intent to defraud creditors. R. Hob. 72.

So, terretenants may plead, that the heir has sufficient by descent, whereof the plaintiff might have execution. Co. Ent. 620.

That the original defendant was not seised of the lands in their possession.

That the original defendant was tenant in tail and died, and his issue levied a fine to the terretenant. Co. Ent. 621.

That the defendant in the judgment was not seised in fee. Th. Br. 272, 273. 289.

That he enfeoffed the terretenant, and before judgment disseised him, whereupon the terretenant after judgment re-entered. Off. Br. 302.

So, terretenants may plead that they have nothing but a reversion after a term of years, and pray *judicium si executio* during the term. Clift. 671.

So, a terretenant may plead *nul tiel record*.

A release to him by the plaintiff.

But it is no plea for a terretenant, that the heir has assets : for though the plaintiff may sue execution against the heir alone, without naming the purchaser ; yet it is not of necessity. 2 Inst. 396. Semb. Co. Ent. 620.

That no *scire facias* was awarded against the executors ; though they have assets. Semb. Dy. 208. a.

Nor, no *scire facias* against him as heir, but as terretenant only ; though he was heir. R. Cro. El. 896.

### [\*](3 L 15.) By the defendant himself.

So, to a *scire facias* after the year and day against the defendant himself, he may plead *nul tiel record*. Off. Br. 279.

That the debt was levied by *feri facias*. Clift. 675.

He cannot plead that the warrant of attorney was given on an usurious contract. Str. 1043. B. R. H. 233.

### (3 L 16.) *Scire facias* upon a recognizance.

So, a *scire facias* may be sued upon a recognizance given in Chancery, against the conusor himself. 2 Sand. 6.

Or, against his heir, or terretenants.

So, against them upon a recognizance in B. R. or C. B.

Or, before the chief justice or other judge out of court.

So, after the debt satisfied, a *scire facias ad computandum* lies by the conusor against the conusee. Vide Statute-Staple, (G).

So, if a conusor dies, a *scire facias* may be sued against his heir. 1 Rol. 900. l. 35.

And it may be sued against him without the terretenants : for he shall have no contribution any more than the conusor himself. Ibid. l. 37. 2 Inst. 396.

Or, it may be sued against the heir and terretenants. Cro. Car. 295.

And if it be returned that there is no heir, or that the heir is dead, or that he was warned, and not otherwise, it may be sued against the terretenants. 1 Rol. 900. l. 45.

So, if the conusee extends part of the lands of the conusor only, the terre-



tenant may have a *scire facias* in the nature of an *audita querela* against him, or an *audita querela*, at his election. R. Jon. 90.

A *scire facias* upon a recognizance must pursue the recognizance.

It cannot be tested the same day the party makes default. Str. 1220.

*Scire facias* against bail in error on a judgment for damages, must be to shew cause why plaintiff should not have execution of the debt aforesaid, (the specific sum in the recognizance), not of the damages. Wils. 98.

But if it concludes, *quare executionem non*, &c. *juxta formam recuperation. prædict.* instead of (*recogn.*) it shall be amended, for it is surplusage. R. 3 Mod. 251.

*Scire facias* in the petty-bag will lie on a bond given to the late king, his executors and administrators, as within 33 H. 8. c. 39. 2 Ld. Raym. 1327. in Chancery.

### (3 L 17.) *Scire facias* for other causes.

So, if a judgment be reversed after execution, a *scire facias* lies for the defendant against the plaintiff for the money recovered. Jon. 326.

If there be judgment in error to reverse a fine, a *scire facias* lies [\*] against the terretenants. and it lies before or after judgment, in the discretion of the court. Hard. 163, 4.

If there be judgment for the plaintiff in replevin, and a return is not made, a *scire facias* lies against the pledges. 2 Mod. Ca. 313. Vide ante, (3 K 5.)

*Scire facias* in replevin will lie on plaint, or on writ. One may be bail with others for himself; if *elongat.* is returned for the principal, the pledges may be sued; if the writ of inquiry is reducible to a certainty, it is enough; and discontinuance is nothing in this suit, unless it had been void or a nullity. Fort. 330.

< *Scire facias* is the proper remedy to avoid a patent of lands, issued by mistake. Jackson v. Hart, 12 Johns. Rep. 77.

But a patent may be declared void, from defects appearing on its face, without a *sci. fa.* Alexander v. Greenup, 1 Munf. 134.

Wherever there is a change of parties by marriage, bankruptcy or death, whereby other persons become interested in the execution of a judgment, a *scire facias* is necessary to make such persons party to the judgment. Johnson v. Parmely, 17 Johns. Rep. 271. >

### (3 L 18.) Judgment in a *scire facias*.

Judgment in *scire facias* depends upon the original judgment; for if this is reversed, the judgment in *scire facias* does not stand in force. 3 Mod. 187. Vide ante, (3 L 8, 9.)

Judgment on a *scire facias* cannot give damages for delay of execution; but if it does, it may be reversed for that, and affirmed *pro residuo*. Str. 807. Ld. Raym. 1532.

But if it is found that plaintiff is damnified, and put to costs to 6*d.*, it is well; for it is only meant as a foundation for the costs *de incremento*. Damages may mean costs. 3 B. M. 1789.

A motion cannot be made in arrest of judgment on a *sci. fa.* after the first four days of term. 3 Price, 203.

Although the 3d section of 8 & 9 W. 3. c. 11. gives costs in *sci. fa.* after plea or demurrer only, yet after a judgment by default in an action within the 8th section of the stat. and a *sci. fa.* issued thereon suggesting breaches, and a consequent assessment of damages, conformably to the act, the plaintiff is entitled to costs under the latter part of the last mentioned clause, by which a stay of proceedings is directed on payment of future damages, costs and charges. 11 East, 387.

The provision in the stat. 8 & 9 W. 3. c. 11. s. 3., which gives costs in all suits upon a writ of *sci. fa.* does not extend to a *scire facias* prosecuted in name of the king to repeal a patent. 7 T. R. 367.

## (3 M) PLEADING IN TRESPASS.

## (3 M 1.) The original.

Trespas is *vicontiel*, which gives commission to the sheriff to hear and determine in his county. F. N. B. 85. F.

And thereon he may determine trespass to any value. Ibid.

And it shall say *vi et armis*. F. N. B. 85. F.

Or, trespass may be sued by a writ directed to the sheriff, and returnable in B. R. or C. B. F. N. B. 86. H.

And this writ shall always say, *vi et armis*. Ibid.

If it be for taking a live chattel, the writ usually says, *cepit et abduxit*. F. N. B. 88. B.

If for a dead chattel, *cepit et asportavit*. Ibid.

If for moveable chattels, *pretii*, &c. Reg. 93. b.

If for immoveable, *ad valentiam*, &c. Ibid.

But *cepit et abduxit*, or *asportavit*, may be used promiscuously for live or dead chattels.

[\*]So, *pretii* or *ad valentiam* may be used promiscuously for a live or dead thing. F. N. B. 88. M. Dy. 121. b. 2 Cro. 307. 2 Vent. 174.

So, if it be omitted in trespass for taking cattle, it is not fatal; for they may be returned. Reg. 97. b.

So, the omission does not prejudice in any case after verdict. R. 1 Sid. 39. 2 Vent. 174.

Nor, upon a general demurrer. Semb. 2 Cro. 147. Cont. 2 Lev. 230.

## (3 M 2.) Process.

The process in trespass is attachment and distress; and if upon the attachment or distress the sheriff returns *nihil*, a *capias*, *alias*, *pluries* and *exigent*, and process to outlawry. 1 Brownl. 193.

If, at the return of the attachment, the defendant does not appear, nor cast an essoin, he shall lose the goods attached. Ibid.

If he casts an essoin, he shall have a writ to the sheriff for restitution of his goods. Ibid.

Though he does not appear at the day to which the essoin is adjourned. Ibid.

When trespass lies or not, and by or against whom, vide Trespass, (A 1, &c.)

When with a *simul cum*, &c. vide Trespass, (C 1.)

## (3 M 3.) Declaration.—In what county alleged.

Declaration in trespass *quare clausum fregit*, must be alleged in the county where the land lies.

So, for any local trespass.

But for battery, taking of goods, &c. it may be in any county. Vide Action, (N 12.)

## (3 M 4.) Must be direct and positive.

It must be direct and positive; and therefore, if the plaintiff declares, *quod cum* defendant, &c. it is bad, for nothing is directly affirmed. R. Cro. El. 507. Noy, 58. R. after verdict, 2 Bul. 215. Semb. 2 Lev. 193. 206. F, g. 256. { Vide Collier v. Moulton, 7 Johns. Rep. 109. But held to be [\*535]

good after verdict, or on general demurrer. *Coffin v. Coffin*, 2 Mass. Rep. 358. *Horton v. Monk*, 1 Browne, 68. }

Though the defendant confesses and justifies the trespass. R. 2 Jon. 197.

So, since the st. 4 & 5 An. 16. for this does not enlarge the former statutes, after verdict. R. in C. B. P. 2 Geo. R. ibm. M. 5 Geo.

So, if the plaintiff declares *quare cum*, &c. R. Sal. 636.

But *nec non de eo quod*, &c. after a *quod cum*, is a positive charge. Str. 681. 2 Ld. Raym. 1413.

*Quod cum* is well enough after verdict, though possibly it might be bad on demurrer. 1 Wils. 99.

In K. B. by bill, the allegation that whereas in trespass is bad; but in C. B. the defect is aided by the recital of the original. 2 Wils. 203.

A new assignment is not admissible, where only one act of trespass has been committed, and the defendant's attempt to justify such act cannot be supported. 16 East, 825. 7 Taunt. 156.

If a defendant, by the abuse of an authority in law, has made himself a [\*]trespasser *ab initio*, and the plaintiff declares in the same count, first for the original act, which might have been justified had not the authority been deviated from, and then for the subsequent outrage or abuse; the defendant by justifying the previous act, under the authority in law, answers the entire cause of complaint; and the plaintiff, in order to cut down the defence, must reply the subsequent abuse. 3 T. R. 292. 1 H. B. 555.

If a trespass was greater than the occasion rendered necessary, the plaintiff, where the abuse was of an authority in law, will reply the excess. 2 Wils. 313. 2 Wils. 20. 5 Taunt. 69.; otherwise he will newly assign it. 8 T. R. 78.

### (3 M 5.) Must be certain.

It must be certain, and therefore must shew the quantity and quality of the cattle or goods taken. R. 5 Co. 34. b. } Vide *Oystead v. Shed*, 12 Mass. Rep. 506. *Richardson v. Eastman*, 12 Mass. Rep. 505. *Mayfield v. White*, 1 Browne, 241. } Vide ante, (C 21.)

The goods must be specified, for otherwise defendant could not justify, nor could the recovery be pleaded in bar to another action. 4 B. M. 2455. [Nor will a verdict cure the defect. Ibid.]

If the word is general: as, *tres pullos*, &c. it must give an Anglice. Lut. 1492.

But it is sufficient that the quantity, &c. is ascertained by a thing to which it refers: as a declaration, *quare cistam cepit et diversa vestimenta in cistu prædicta*, is good, without saying what clothes he took. R. Al. 9. Vide ante, (C 27.)

And in trespass *quare clausum fregit* the declaration may be general, without naming the closes which draws on the common bar, and new assignment. 2 Bl. 1089. < Vide *Durgin v. Leighton*, 10 Mass. Rep. 56. >

It must allege the time of the trespass before the declaration filed; and therefore, if the declaration is filed in Trinity term, and the trespass alleged after the term and before trial, it is bad. 1 Sid. 308.

If it is alleged after the declaration filed, at any time, it is bad upon demurrer.

If it is alleged after the declaration and before trial, it is bad after verdict, except where the jury find specially that the defendant was guilty before the declaration filed. R. 1 Sid. 308. R. M. 8 W. 3. Sal. 662.

But, if it is alleged at a day after trial, it will be aided by verdict. Ibid. Vide ante, (C 19.)

Or, at an impossible day. R. M. 8 W. 3.

If it is alleged that such a day the defendant imprisoned him, and de-

tained him twenty-four days, without saying when, it shall be intended immediately after the imprisonment. R. 2 Cro. 664.

If it alleges *et alia enormia eis intulit* instead of *ei*, it is not material. Ibid.

So, if it alleges the trespass in a close *vocat. A. abultan. super terras B.* in D., the close shall be intended in D. R. 2 Rol. 251. l. 45.

Matters in aggravation may be given in evidence. 2 M. & S. 79. < Vide Avery v. Ray, 1 Mass. Rep. 12. Johnson v. Courts, 3 Har. & M'Hen. 510. And so many things may be averred in aggravation, which would not of themselves be a cause of action. Horton v. Monk, 1 Browne, 65. Heminway v. Saxton, 3 Mass. Rep. 222.

In trespass against the sheriff, for the act of his deputy, the declaration need not set forth that the act was done by the deputy. Grinnell v. Phillips, 1 Mass. Rep. 580.

A declaration in trespass for entering the plaintiff's house, taking his goods, and terrifying and imprisoning his wife, is good after verdict; and the injury done to the wife shall be intended as matter of aggravation only. Heminway v. Saxton, *ut supra*. >

### (3 M 6.) Must be conformable to the original.

It must be conformable to the original; and therefore, if the declaration is *quare clausa*, when the original was *quare clausum fregit*, it is bad. R. Cro. El. 185. Vide ante, (C 13.)

[\*] If the declaration is *quare clausum*, omitting *fregit*, and the writ *quare clausum fregit*. Per two J. Vent. cont. 2 Vent. 153.

But an immaterial variance, or what may be supplied by intendment, does not prejudice. Ibid.

Nor, a mistake of *summon. for attach*. Vide ante, (C 13.)

### (3 M 7.) Must be *vi et armis*.

It must be *vi et armis et contra pacem*; for the omission is substance. R. 2 Cro. 443. 526. 536. Adm. Cro. Car. 325. R. that it was form. 2 Cro. 130. R. Sal. 636. 640. Carth. 66.

But now, by the st. 16 & 17 Car. 2. 8. it is aided after verdict.

This statute applies to those cases only which appear on the face of the declaration to have been intended to be actions of trespass, and not where the memorandum is of "an action of trespass on the case." 6 T. R. 125.

And by the st. 4 & 5 An. 16. upon a general demurrer.

So, if it is recited in the writ, it is sufficient; though it is omitted in the declaration. R. Lut. 1509. Semb. Sti. 408. Dub. F, g. 266. Vide ante, (C 12.)

### (3 M 8.) Must be *contra pacem*.

It must be *contra pacem nuper regis & regis nunc*, if the trespass is alleged in a former reign. R. Sho. 28. Adm. 2 Vent. 49. 2 Cro. 377. R. Sal. 636. R. that it may be so. 11 H. 4. 15. b.

But *contra pacem nuper regis et regis nunc*, where the whole was in a former reign, is surplusage as to the words *regis nunc*, and shall be aided. R. 2 Cro. 377. 3 Bul. 82. R. Carth. 95.

So, *contra pacem regis nunc*, if trespass is such a year, which was in a former reign; for the court, takes notice of the king's demise. R. Sal. 640.

It must mention the goods to be so much *pretii*, or *ad valentiam*, &c. 2 Lev. 230. Vide ante, (3 M 1.)

But it is sufficient if it is in the writ, though omitted in the declaration. R. 1 Sid. 150. Vide ante, (C 13.)

[\*535]

And shall be aided after verdict, and upon a general demurrer, for it is form only. 2 Cro. 148. Vide ante, (3 M 1.)

(3 M 9.) Must shew a property or possession in the plaintiff.

So, the declaration must say that the property, or at least the possession, of the land or goods, &c. is in the plaintiff; and therefore, if in trespass *ipsius quer.*, or *sua*, is not inserted, it is bad. R. 1 Sid. 131.

And it will be bad after verdict. Ibid.

{ But in North Carolina, the owner of wild lands may bring trespass, though he be not in the actual possession. Kennedy v. Wheatly, 2 Hayw. 402. }

In trespass *de bonis*, the omitting to state that the goods were the plaintiff's is not cured by a verdict, for the plaintiff's title rests on that point, and a verdict never cures a defect of title. 1 F. 381. 478. 548. Stra. 1023.

But in an action by original, if the writ states the goods were the plaintiff's, it will cure the omission in the declaration. R. Ibid.

And if the goods are from their nature likely to be appropriated, or annexed to any particular place, and to belong to the occupier of that place, if the place is alleged to be the plaintiff's no objection can be taken after verdict, because the goods are not expressly shewn to be his. Ld. R. 239.

[\*] Thus in trespass for fishing in the plaintiff's several fishery, and taking fish, though the declaration did not state that the fish belonged to the plaintiff, the court held that as the fishery appeared to be his, they would, after verdict, take it the fish were his also. Ld. R. 239. P. C.

Though it is *quare clausum fregit* of the plaintiff, and *5 carrectat. fæmi ibidem cepit*, omitting *sui*; for it shall not be intended the plaintiff's hay, though it is in his close, without being alleged. R. 2 Lev. 156.

So, a declaration by husband and wife for taking the wife's goods, is not good, without saying that they were the goods of the husband; for it shall not be intended. R. 2 Lev. 20.

So, a declaration for taking goods a *persona* of the plaintiff, shall not be intended in his possession. R. per three J. two cont. Yel. 36. 2 Cro. 46. 1 Brownl. 192.

So, trespass by dean and chapter for entering the close of the dean, is not good. R. Cro. El. 200.

So, trespass for taking *tritium* out of his close in D., and such a thing *de bonis* of the plaintiff in D.; for *de bonis* of the plaintiff does not extend to the *tritium*. R. Mod. Ca. 15.

So, trespass *quare equos in clauso suo existen.*, et 10 congios *tritici de bonis* plaintiff *existen.*, does not shew a property in the horses. R. Sal. 640.

But if *ipsius querentis* or *sua* is in the original recited, it is sufficient though omitted in the declaration. R. 1 Sid. 187. R. Lut. 1509. Vide ante, (C 12.)

So, if the defendant by his plea shews the goods to be in the possession of the plaintiff, this aids the declaration. R. 1 Sid. 185. Vide ante, (C 85.)

And, in trespass for things which are *feræ naturæ*, and not reclaimed, the plaintiff must not say *suos*. R. 22 H. 6. 59. b.

As, in trespass *quare cuniculos, damus, pisces, &c. cepit*, he must not say *suos*, or *ipsius*. R. 3 Lev. 227.

Yet, in trespass for taking animals which were *feræ naturæ*, if he shews them to be reclaimed, he may *suos*. 22 H. 6. 59. b.

Or, for taking monkeys, parrots, &c.; for they are merchandize, and valuable. 2 Cro. 262.

Or, for taking *feras naturæ* in his soil, park, or warren, for he has the pos-



sessory property, as, *quare clausum fregit*, or, *parcum*, or *warrenam fregit et cuniculos suos, damas suos, &c. ibidem invent. cepit, &c.* R. 22 H. 6. 59. b. 2 Cro. 195. R. Cro. Car. 553. 7 Co. 17. b. (Com. 34.) Dub. 3 Lev. 227. R. Sal. 556. (Vide 1 Ld. Ray. 250.)

So, in trespass *quare cuniculos suos, &c. cepit*, generally is well after verdict; for they shall be intended to be tame, or reclaimed, or dead. R. Cro. Car. 18. R. Ray. 16. D. Cro. El. 125. Ow. '93. R. 5 Mod. 375.

So, *quare canem suum*. R. cont. 3 Leo. 219.

So, *quare pisces suos in seperali piscaria querentis cepit*. R. Jon. 440. Cro. Car. 553, 4.

So, if the plaintiff declares *quare clausum in usu et occupatione* of the plaintiff, it is well. R. P. 3 W. & M.

[\*]Or, *quare bona sua, viz. unam carectat. fani in stabulo defendentis cepit*, though he does not say *sui*, for the *viz.* makes it a particular of *bona sua*. R. 3 W. & M.

So, if he declares *quare 10 carectat. soli ad valentiam 100l. and 10 pecias maherem. ipsius querentis ad valentiam, &c.* it is sufficient; for *ipsius querentis* refers to both. R. 2 Rol. 250. l. 40.

### ( 3 M 10.) When it may be with a *continuando*.

A declaration in trespass may allege it to be committed *continuando* from such a day to such a day. 2 Rol. 545. l. 15.

And this in trespass *quare clausum* or *domum fregit*, as well as for spoiling his grass, or cutting his corn. F. N. B. 91. L. 2 Rol. 549. l. 37. 40. 1 Sid. 319.

Or, for cutting down several acres of wood. 1 Sid. 319.

Or, for mesne profits, and *asport 500 carectat. frumenti*. Semb. Ibid.

Trespases on different days may be laid in one count, for breaking, &c. on such a day, with a *continuando*; and if there are more counts, the court, on application, will reduce them to one. Barnes, 360.

And the *continuando* may be for any trespass which does not import repugnancy, though the act was not continued; as, for trespass *pedibus ambulando*, though it be the act of a man. Mod. Ca. 39, 40. Semb. 5. Mod. 179. Vide infra.

Entering his close and killing his conies. R. Mod. Ca. 39.

Entering and hunting. R. Sal. 639.

Trespass for breaking a house or hedge, may be laid with a *continuando*. D. Ld. R. 240.

Trespass for throwing down a house or hedge, not: for when the house or hedge is once thrown down, it cannot be thrown down again. Ld. R. 240.

At least trespass for throwing down so many perches of a house or hedge, cannot be laid with a *continuando*. D. Ld. R. 240.

Trespass for taking loose chattels cannot be laid with a *continuando*. Ibid.

And the *continuando* may be alleged for several years, for 10, 12, or 500 years. 2 Rol. 549. l. 47. 3 Mod. 110. 1 Sid. 253.

It may be to a day after the term began, if it be before the bill filed. D. 1 Vent. 264.

But, regularly, a *continuando* cannot be alleged in a trespass which has not continuance: as, for a single act; as, in trespass *quare arborem succidit, equum cepit, &c.* R. 2 Rol. 549. l. 41. 1 Sid. 319. R. Sal. 639.

Nor for the act of a man, though the act in its nature may be done upon several days; for a man cannot act continually several days without interruption by sleep, meals, &c.: and therefore trespass, *quare ejecit billets*

*super solum suum continuando ejectionem, &c.* is bad. R. 1 Sid. 224. 249. R. 1 Vent. 363. Vide supra.

So, trespass *quare grana cepit et asportavit continuando asportation.* Semb. 1 Sid. 319.

*Quare occidit 20 cuniculos, &c. continuando.* Mod. Ca. 39. Sal. 639.

So, the *continuando* ought to be certain; and therefore *continuando* [\*]piscation., without saying the quantity and quality of the fish, is bad. R. after verdict by three J. Scrogs cont. 1 Vent. 329. 2 Jon. 109.

So, *continuando usque diem exhibitionis billæ*, without saying what day, is bad; though it appears upon the record. Semb. 2 Rol. 135.

So, *continuando* to a day after the commencement of the action, and entire damages, is bad after verdict. D. 1 Vent. 104. R. 1 Vent. 264.

Yet *continuando transgression. prædict.*, generally, is good. 1 Sid. 224. 5 Mod. 179.

And if the declaration is for one trespass, which may, and another which cannot be with a *continuando*, the *continuando transgress. præd.* shall be restrained to the trespass only, which may after verdict. R. 1 Sid. 249. 319. 379. R. 1 Vent. 363. 2 Jon. 194. 3 Lev. 94. R. Sal. 639.

Where a *continuando* is subjoined generally to several acts, and is properly applicable to some only, it shall be confined to them after verdict. D. Ld. R. 239. 240.

And though a *continuando* is expressly confined to a charge which cannot be laid with a *continuando*, if the count in which it is contained comprehends other charges upon which damages might be given, the court will presume after verdict that no damages were given for the matter improperly laid with the *continuando*. R. Ld. R. 239.

So, *continuando transgr. quoad, &c.* which is expressed *minus certe*, shall be aided after verdict. R. 1 Sid. 249.

So, a *continuando* to a day impossible, or after trial. Vide ante, (3 M 5.)

So the plaintiff may allege the trespass with a *continuando*, or that *diversis diebus et vicibus inter* such a day and such a day, &c. Sal. 639.

So, the plaintiff may allege a matter for aggravation of the trespass, though an action is not maintainable for it by itself: as, entry into his house, and battery of his wife and children, &c. though trespass does not lie for this without special damage. Sal. 642.

Entry into his close *continuando usque* 6 Nov. if the king pardons the trespass as to him to 25 Sept., no *capiat.* is necessary, the *continuando* being alleged for aggravation. R. 2 Cro. 207.

Declaration that the defendant on such a day, and on divers other days, &c. assaulted the plaintiff, is bad. Cowp. 828.

< So, a declaration that there afterwards the defendant continuing his assault last aforesaid, is not within the technical import of a *continuando*. Benson v. Swift, 2 Mass. Rep. 50. >

A declaration that A. on a certain day, and on divers other days, made an assault on B., held bad on special demurrer. 2 Smith, 445. 6 East, 395.

A declaration that the defendant on such a day, and on divers other days, assaulted the plaintiff, was held good. 2 B. & P. 425.

### (3 M 11.) Pleas in trespass.—Not guilty.

To trespass the defendant may plead the general issue, not guilty.

Not guilty *infra sex annos.* Lev. Ent. 203.

Or, *infra quatuor annos.*

Though he was indicted and found guilty, or submitted to a fine for the same trespass. 1 Rol. 863. l. 2.

And in trespass for battery of his servant, *per quod servitium amisit*, [\*]generally, not guilty, is a proper plea: for he cannot justify by *molliter manus*, &c.; for this would not be a loss of service. 1 Rol. 393, 4. Per Powell, Lut. 1497. Semb. 1 Rol. 19.

But in battery, not guilty within six years, instead of four years, is bad. R. Mod. Ca. 40. Sal. 423.

On not guilty pleaded, a freehold may be given in evidence. Andr. 108. 2 Kel. 154. 7 T. R. 354. 8 T. R. 403. Infra, (3 M 34.)

Capture as prize may be given under not guilty. Dougl. 594.

In the case of an easement, the plea must be special. 2 Wils. 173.

In the case of a licence, the plea must be special. 2 T. R. 166.

If in trespass for cutting the plaintiff's posts, the defendant pleads the general issue, and a special justification, because they were wrongfully fixed upon his land; since this admits that the property therein remained with the plaintiff, he cannot defend the act under the general issue, on the ground that the property, by the act of annexation, became his own. 8 East, 394.

< So, in trespass *de bonis asportatis* against a collector of the customs, it is a good justification that the goods were imported contrary to law, and were seized as forfeited. Saily v. Smith, 11 Johns. Rep. 500.

Nor can the defendant shew property in a stranger; though it is otherwise in trover. Cook v. Howard, 13 Johns. Rep. 276. >

### (3 M 12.) In discharge.—A release.

Or, he may plead specially; and this in discharge, or in excuse or justification.

In discharge he may plead a release by the plaintiff. Vide ante, (2 V 11. —2 W 30.)

If the action be by executors for goods of the testator, a release by one of the executors. Win. Ent. 1005. (or 1119. edit. 1680.)

So, if there are several defendants in trespass, a release by the plaintiff to one of the defendants. 2 Rol. 412. l. 20. 2 Bro. Ent. 151.

Or, in trespass against B., he may plead that the trespass was committed with A., and the plaintiff released to A., *absque hoc* that it was done by him alone. R. 1 Brownl. 193. R. Hob. 66.

If the release be upon a day before the trespass alleged, he must traverse the trespass after. R. 4 Mod. 182.

If a release is pleaded, defendant must traverse that he was not guilty at any time after, and before the bringing the action. Fort. 359.

If a release is pleaded, he need not plead not guilty to the *vi et armis*. 1 Brownl. 196.

A release in pursuance of an award cannot be pleaded, if defendant is not party thereto, but it may be given in evidence in mitigation of damages; and if the words are general, the plaintiff shall not shew that the cause of action was not included. Str. 646.

### (3 M 13.) Accord or arbitrament.

Accord and satisfaction. Win. Ent. 961, 962. (or 1075, 1076. edit. 1680.) Vide Accord, (A 1, &c.)

Or, arbitrament. Bro. V. M. 429. Cl. Ass. 179. { Vide Sellick v. Adams, 15 Johns. Rep. 197. }

So, an accord or arbitrament between the plaintiff and one defendant, if it is performed. 2 Rol. 412. l. 22. R. 9 Co. 79. b.

So, satisfaction, though it is illegally obtained. 2 Rol. 569. l. ult.

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**[\*]Replication.**

To accord pleaded, the plaintiff may reply *nul tiel accord*. Win. Ent. 961. (or 1075. edit. 1680.)

Accord for another matter with traverse of the acceptance in satisfaction of this trespass. Bro. V. M. 444.

That he is guilty after accord made. Win. Ent. 962. (or 1076.)

So, to arbitrament the plaintiff may reply *nul tiel award*.

Or, *nullum fecerunt arbitrium*. Bro. V. M. 430.

That the arbitrators were discharged. Cl. Ass. 180.

So, to trespass with cattle the defendant may plead that the plaintiff distrained the cattle damage-feasant, and impounded them.

But it is a good replication, that the cattle died in the pound before satisfaction.

Not, that they escaped out of the pound without his consent. Per three J. 1 Sal. 248.

**(3 M 14.) Recovery in another action.**

Recovery in another action. Vide Action, (K 1, &c.)

**(3 M 15.) In excuse or justification.—To an assault and battery.—*De son assault*.**

In excuse or justification of an assault or battery, the defendant may plead *son assault demesne*. Co. Ent. 644. a. Lut. 1431.

Or, assault of her husband, where the trespass is for battery of the wife. R. Sal. 407.

Assault by the plaintiff upon his wife, or son, or father. Win. Ent. 1007. (or 1121. edit. 1680.) Cl. Ass. 90.

Assault upon his master or servant. 2 Rol. 546. D. Ow. 150. Lut. 1483. 1 Sal. 407. Bro. V. M. 484.

If servant justifies, for that plaintiff having assaulted his master, he, in defence of his master, struck him, it is ill; it should be, that plaintiff would have beat his master if he had not interposed. Str. 953.

Assault by the plaintiff upon the defendant to take his dog, goods, &c. to intrude into his house, &c. 2 Bro. Ent. 144.

So, he may plead *son assault* in trespass for wounding. R. 1 Sid. 240. 1 Rol. 19.

Or, in mayhem, though every assault is not sufficient to maintain it. Sal. 642.

So, in assault against two, they may jointly plead *son assault*. R. Mo. 704.

So, he may plead *son assault ad interficiendum*, or *mayhemandum*, in trespass for mayhem. 2 Rol. 547. l. 40. Co. Ent. 52.

But the defendant cannot justify a battery in defence of the goods or possession of his master. Semb. Lut. 1483. 1 Sal. 407.

**[\*]Replication.**

To this plea the general replication is *de injuria sua propria*, &c.

Or, he may reply that he *pacifice arrestavit*, upon which the defendant assaulted him.

That the defendant would have assaulted her husband, father, son, &c. R. 1 Sal. 407.

{ To *son assault demesne*, the plaintiff must reply *moliter manus imposuit*; he cannot give it in evidence under the general replication of *de injuria sua propria*. *Collier v. Moulton*, 7 Johns. Rep. 109.

To the plea of *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*; but must traverse the title. *Hyatt v. Wood*, 4 Johns. Rep. 150. }

(3 M 16.) *Moliter manus imposuit*.

So, the defendant may plead that he *moliter manus imposuit* to prevent mischief; as, if two contend, that he *moliter manus imposuit ad eos separand*. 2 Bro. Ent. 143.

*Quod moliter manus imposuit* upon the plaintiff (who assaulted another) to keep the peace. 2 Bro. Ent. 137, 8.

And *moliter manus imposuit* goes to the justification of the battery, as well as the assault. Dub. Lut. 929. 3 Lev. 404. Semb. cont. Cro. El. 94. 2 Vent. 193. R. acc. Skin. 387.

*A fortiori* it does not go to the wounding. R. Cro. El. 94. Semb. Cro. El. 243. Skin. 387. { Vide *Gates v. Lounsbury*, 20 Johns. Rep. 427. }

So, that the plaintiff set a dog upon such a one, and he *moliter manus imposuit* to restrain him. 2 Rol. 546. l. 40.

That the defendant *moliter manus imposuit* upon the plaintiff, to restrain him from pulling down his stall in a fair. 2 Rol. 547. l. 15.

To restrain him from diverting his watercourse. Ibid. l. 10.

From taking or destroying his goods, &c. 2 Rol. 549. l. 7. 2 Bro. Ent. 143, 144.

From taking cattle, &c. in his custody upon a distress. 2 Rol. 549. l. 10.

Or, rescuing them. 2 Bro. Ent. 260.

From taking his dog, horse, &c. Cl. Ass. 92. Bro. V. M. 486.

From rescuing goods taken in execution, and he need not say by the bailiff's command. R. 3 Lev. 113.

*Quod moliter manus imposuit*, to remove him out of his house or close. Lut. 1435.

That plaintiff entered his house without his leave, and there disturbed him; and because he would not go out, therefore *moliter*, &c. B. R. H. 358.

And he must shew a title to the house or close; for it is not sufficient to say that he was possessed. R. Mo. 846. Semb. Lut. 1497. Vide ante, (C 39. 41.—E 19. 21.) Vide infra.

To detain him *quod non exiret* a tavern before he had paid his reckoning. Cl. Ass. 100.

To restrain him from disturbing a parson at a funeral. R. 1 Mod. 168.

*Quod molliter manus imposuit* to bring him before a justice of peace for cheating at cards. R. 2 Rol. 546. l. 30.

To arrest him upon a justice of the peace's warrant. 2 Rol. 546. A.

So, if an officer, or any one in his aid, arrests upon process of law.

[\*] A battery cannot be justified by *molliter manus* on an arrest only, but defendant must shew resistance, or an attempt to rescue. Str. 1049. B. R. H. 298.

A defendant may justify a battery by pleading *molliter manus*, &c. in order to arrest, &c. Willes, 14. 688.

If there was actual force, he may use actual force to remove, without a request to depart. R. Sal. 641.

Otherwise, where only force in law. Semb. Ibid.

If the defendant pleads *molliter manus* in defence of his possession, he need not shew by what title he was possessed; for it is only inducement to

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the plea. R. Cro. Car. 138. R. cont. Mo. 846. Semb. cont. Lut. 1497. Vide supra—vide ante, (E 19. 21.)

But a man cannot plead that he threw stones *molliter* against a trespasser to remove him, &c. R. 2 Rol. 548. l. 45.

In trespass for throwing water upon the plaintiff, and into her apartment, the defendant pleaded that the plaintiff had begun wrongfully to block up the defendant's window in a house contiguous to the plaintiff's room; that he prayed her to desist, and upon her refusal, threw a little water into the room to hinder, &c. Plea held bad. 4 Taunt. 821.

Nor, justify a wounding by a *molliter manus*. Semb. 2 Rol. 548. l. 35. Lut. 1436. 1483. 1 Rol. 19.

Where, to a declaration for striking the plaintiff repeated blows, and with great force and violence, several times knocking her down, the defendant pleaded that *molliter manus imposuit*, in order to turn the plaintiff out of his house, where she continued against his will, the plea, on special demurrer, was held bad. 8 T. R. 299.

And, if he concludes *et sic molliter insult fecit*, for *manus imposuit*, it will be bad. R. 1 Sid. 441. 1 Mod. 36.

So, a defendant cannot justify *man. imposition.*, because the plaintiff would have struck his horse, &c. without saying that he assaulted or beat. R. Lut. 1483.

Or, to remove him from his land, without saying he was upon it. R. Lut. 1497.

Or, that he removed him from off a horse, which he had borrowed for two days, because he went out of his way. R. 1 Brownl. 218. 2 Cro. 236.

So, he cannot justify the battery of a servant, by which the plaintiff lost his service, by *molliter manus imposuit*. Lut. 1497. Vide ante, (3 M 11.)

### Replication.

To *molliter manus* the plaintiff may reply *de son tort demesne*. Tho. Ent. 422.

Or, an outrageous battery *absque hoc molliter*, &c. Lut. 1436. Skin. 387.

### (3 M 17.) Defence of his possession.

So, the defendant may plead to an action for assault and battery, that it was in defence of his house; for that is his castle. 2 Rol. 548. l. 43. 2 Bro. Ent. 138.

So, in defence of his possession. 2 Rol. 548. l. 25. Cont. per Twisd. 1 Mod. 36. Vide Lut. 1483.

[\*]In defence of his servant. 2 Rol. 546. l. 52.

In defence of his dog, cattle, &c. Ow. 150. Qu. If it is not to be understood by *molliter manus imposuit*. Vide Lut. 1483.

If, on the defendant gently laying hands on the plaintiff to remove him from his close, the plaintiff resists, the defendant may oppose force to force. 8 T. R. 78.

But a man cannot justify a wounding in defence of his possession. R. 2 Rol. 548. l. 35.

Nor, a battery for disturbance in erection of a booth. Ibid. l. 40.

Nor, for being in a park in the night, if he does not resist or fly from the keeper. Ibid. l. 30.

Nor, in defence of his master's goods. Per Powell, Lut. 1483.

### (3 M 18.) Amicable contest.

So, the defendant may plead that he wrestled with the plaintiff for a wager.

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**(3 M 19.) Due correction.**

So, the defendant may plead that the plaintiff was a lunatic, &c. and he chastised him in order to bring him to sound mind. 2 Rol. 646. l. 25. 559. l. 50. Pl. Com. 18. b.

That the plaintiff was his scholar, and he corrected him.

Or, his servant, son, or wife, and he corrected. 21 Ed. 4. 6. a. 53. a.

But it is no plea to trespass for a battery that the defendant was a lunatic. 2 Rol. 547. l. 1.

{ The master of a vessel may inflict due correction upon the seamen; but if he exceed the bounds of moderation, and be guilty of cruelty, or unnecessary severity, he will be liable as a trespasser. *Brown v. Howard*, 14 Johns. Rep. 119. }

**(3 M 20.) Inevitable necessity.**

So, the defendant may plead that he did it through inevitable necessity against his will: as, that at a muster he (being a soldier) discharged his musket, and the plaintiff suddenly crost him, whereby he was inevitably struck, against his will. R. 2 Rol. 548. l. 10. Mo. 864. Vide post, (3 M 30.)

But the plea is not good, if it does not appear to the court that it was inevitable without the defendant's default or negligence; as, if he says the plaintiff casually had the gun discharged in his face. R. 2 Rol. 548. l. 10. Mo. 864. Ray. 423.

That A. assaulted him, and in lifting up his stick for his defence he casually struck the plaintiff. Ray. 423.

So, in trespass for assault and battery, plea, that the horse upon a fright run against the plaintiff, who, upon being called to, would not get out of the way, is bad: for it does not answer the battery. R. 4 Mod. 405.

So, plea, that he shot an arrow at butts, and wounded the plaintiff against his will. 21 H. 7. 28. a. Ray. 423.

That he cut down his hedge, and the branches of the trees, *ipso invito*, fell upon the land of the plaintiff. Ray. 422.

Or, fell into the river, whereby the watercourse to the plaintiff's mill was stopped. Ray. 423.

That in building his house timber *ipso invito* fell upon the house of another. Ibid.

**[\*](3 M 21.) To an assault *per quod consortium*, &c. *amisit*.**

So, to trespass *per quod consortium*, or *servitium amisit*, the defendant may plead not guilty.

So, he may say, that the wife or servant made the first assault; for if he justifies the battery, it will be an answer to the loss of service, &c. which is consequential. Per two J. 1 Rol. 393. Tho. Ent. 390.

**(3 M 22.) To false imprisonment.—By his own authority, as an officer, &c.**

To trespass for false imprisonment, the defendant may plead that he did it *virtute officii*: as, that he, being constable, saw the plaintiff break the peace, and therefore he put him in the stocks. Cl. Ass. 99.

That, being constable, he put the plaintiff in the stocks for making hue and cry without cause. Bro. V. M. 479.

For keeping a house of bad fame. Ibid.

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But now, by the st. 7 J. 5. a constable for any thing done by virtue of his office, may plead not guilty.

So, the defendant may plead, that he, being governor of the plantations, committed, till he was brought to the court of *oyer and terminer*. Ca. Parl. 25.

So, the defendant may plead that he did it to prevent apparent mischief, which might ensue: as, to restrain the plaintiff, non sane. from killing himself, or others, burning a house, or other mischief. 2 Rol. 559. l. 35. Vide ante, (3 M 19.)

A private person may justify breaking and entering the plaintiff's house, and imprisoning his person to prevent his committing murder on his wife. 2 Bos. & Pul. 260.

That the plaintiff and another were fighting, and he restrained him from fighting till the rage was over. 2 Rol. 559. l. 40.

That the plaintiff was a cheat, and played with false dice, and the defendant took him to carry him before a justice of peace. Jon. 249.

That the plaintiff would have left a child in the parish, and he took him before a justice. 1 Leo. 327.

But it is no plea, that he apprehended and detained him till he consented to remove a misdemeanour, nuisance, &c. Ibid.

The defendant cannot justify a restraint (because they threatened to fight) to prevent it. 2 Rol. 559. l. 45.

Or, by prescription to imprison for a day or two at discretion, if any one *contemptuous se gesserit* towards bailiffs of the corporation, &c. R. 2 Leo. 34.

That he, being constable, took away salmon taken contrary to the st. 1 El. 17. is not good, without the warrant of a justice of peace. R. 1 Sal. 407.

[\*](3 M 23.) By warrant of a justice of peace.

But by the st. 7 Ja. 5. in an action against a justice of the peace, mayor, bailiff, constable, &c. for any thing done by virtue of their offices, or against any others in aid, or by command of such officers, (which act is made perpetual by the st. 21 Ja. 12.) the defendant now may plead not guilty, and give the special matter in evidence. Vide ante, (3 K 26.)

And therefore, if a man seizes a gun, &c. of a person not qualified, by a justice's warrant, he may plead not guilty. Lut. 1506.

So, if the defendant justifies, as judge or officer, he must shew his authority. Ca. Parl. 29.

And that the matter was within his conusance or jurisdiction. Ibid.

So, if the defendant justifies an arrest by command of a justice, or mayor, he must shew in certain for what cause it was. R. 2 Cro. 81.

If he justifies by command of a dean and chapter, he must shew a precept, or warrant. R. Carth. 74.

One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal, and may be pleaded to an action of trespass. 7 R. R. 367.

The judgment of the commissioners of land tax on appeal is conclusive in an action of trespass brought against the officers for levying under a warrant of distress. Ibid.

So is the judgment of commissioners of appeal, and cannot be questioned in an action of trespass. 2 Bos. & Pul. 391.

{ A distress warrant for taxes, will justify the officer, in trespass *quare clausum fregit*, where the premises are liable to assessment, but which have been erroneously assessed. Henderson v. Brown, 1 Caines' Rep. 91. }

## (3 M 24.) By process.

So, the defendant may plead that he did it by mesne or judicial process out of the king's court: as, upon a *ca. sa.* after judgment in B. R. or C. B. 2 Bro. Ent. 284. 2 Vent. 190.

That he retok the plaintiff before the return of the writ on mesne process, though he had voluntarily permitted him to go at large, after the first arrest. Semb. 2 T. R. 172.

If a declaration for false imprisonment against A. and B. contain two counts, to both of which the defendants plead not guilty, and justify the first under mesne process, A. as the plaintiff in that action, and B. as the bailiff; and the plaintiff, by new assignment admitting the arrest to be lawful, reply that B. with the consent of A. voluntarily released him, and that they afterwards imprisoned him, for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of A. shall not be permitted to prove the same trespass against B. under the other count. Semb. 2 T. R. 172.

\* To trespass, assault, and false imprisonment, three defendants pleaded a joint plea of justification under process, &c.; in which one said that he, as attorney for the party suing out that process, delivered the warrant to the other two defendants (to whom it was directed) to be executed, &c.; and the two others that they executed, &c.; and it was holden a good plea. Ibid.

A *ca. sa.* on a judgment afterwards set aside for irregularity, is no justification to the plaintiff; but, on an erroneous judgment, it is. Str. 509.

[\*] Or, upon a *fiery facias* or *ca. sa.* after judgment in an inferior court. Lev. Ent. 176. 206.

Or, upon mesne process out of B. R. or C. B. 3 Lev. 62. Tho. Ent. 315. 344. 1 Bro. Ent. 219.

Or, an attachment of privilege.

Or, by *homine replegiando*. Lut. 1430.

Attachment, &c. out of Chancery. Lev. Ent. 191.

Or, upon process from a county palatine.

Or, out of an inferior court of record. Tho. Ent. 34.

Or, out of the court of Admiralty. 2 Lev. 131.

Or, of a county or hundred court, &c. Lev. Ent. 212. Lut. 1440.

Or, by the command of the chief justice to deliver him to the marshal according to custom. 2 Rol. 558. l. 35.

If the defendant justifies by a judicial process out of a superior court, it is sufficient to allege the judgment, writ of *ca. sa.* and warrant thereon to the officer.

And the officer himself need not allege the judgment, only the writ and warrant. R. 3 Lev. 20. 1 Sal. 409.

So, if by mesne process out of a superior court, it is sufficient to allege the writ to the sheriff and warrant upon it.

So, it is sufficient to shew a writ to the sheriff, and a warrant to the defendant before the arrest, though there was not an actual delivery of the writ to the sheriff before the arrest, if the defendant had not notice of the non-delivery. R. 3 Lev. 93. Dub. Mod. Ca. 70. R. 2 Lev. 19.

A defendant in an action for false imprisonment, pleading a justification under mesne process sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail without setting forth the cause of action. 3 T. R. 183.

And if the writ be pleaded as sued out on a day between the essoign day and the first day of term, and there be a special demurrer for that cause, the objection will not prevail, though the court do not sit in fact till the *quarto die post*. Ibid.

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If the officer joins in the same plea with defendant, for whom the warrant is no justification, he forfeits the benefit of it. Str. 509. 2 Str. 993.

If plaintiff in an action in an inferior court, and officer, jointly justify under a process returnable at next court, they must shew a return made; or officer trespasser *ab initio*, and plaintiff by joining in plea is equally affected. Str. 1184. 1 Wils. 17.

A principal officer, to whom returnable process is directed, must shew that it is returned, but a subordinate officer need not. Willes, 30. Willes, 122.

An officer of an inferior court may justify acting under process, which is only voidable, but not under void process. Willes, 122.

Officers justified under a precept stated to bear date 26th February, issuing out of a court held 24th February, and it was holden that the process was void, and the justification bad. Ibid.

Quære. Whether it be not necessary for the officer of an inferior court, to whom its precepts are directed, to shew a precept, under which he justifies, returned? Ibid.

If in such case he do not, but rely merely on the precept itself, whether it [\*] be necessary for him to conclude the plea *prout patet per recordum*. Quære. Ibid.

But if he do shew the return, as well as the precept, the plea must so conclude. Ibid.

When an officer of an inferior court justifies under a precept to take the goods of A. in execution, the precept and return are not merely inducement, but of the substance of the justification. Ibid.

Though an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction. Ibid.

Defendant justified as an officer of an inferior court for trying, &c. causes touching mines and miners within a certain district: the plea was holden bad, because it did not allege that the defendant below was a miner, "at the commencement of the suit below," but only "when the execution issued." Ibid.

If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length, otherwise the plea is bad, not only as it respects him, but the officers of the court also, who join with him in the plea. Ibid.

Quære. Whether a person, who acts at the request of the officers and in their aid, in executing civil process of an inferior court, be such a stranger? Ibid.

Plea of justification under the process of an inferior court, holden "at the forest of D.," which contains many thousand acres, without stating in what particular part of the forest, good. Semb. Ibid.

The proceedings of an inferior court may be pleaded by "*taliter processum est*," &c. in the case of officers of the court; and in the case of the party also. Willes, 528.

If it be stated in a plea that a precept issued out of an inferior court, it will be taken that it was issued by the judge of that court. Ibid.

A precept out of an inferior court, "to attach or distrain" the goods of the defendant, to compel his appearance, is good. Ibid.

In case, against an officer for false imprisonment on 12 G., if he pleads process of an inferior court, it is an excuse good enough for him. Fort. 344.

But if the justification is by mesne or judicial process out of an inferior court, he must shew all the proceedings at large, regularly. Vide ante, (E 18.)

And therefore, if a good authority does not appear for holding the court, it is bad. Lut. 918. R. 3 Lev. 141. 243. Lut. 1464. 1457. 2 Jon. 165.

If he shews an authority by patent and prescription, it is not good. Semb. Mod. Ca. 70.

In trespass for taking goods, if defendant justifies for that, according to custom of city, he levied a plaint, &c. it is good; though he does not say the court was held according to custom, though it is of horses or geldings, though he does not aver they were taken within the jurisdiction, (if it appears they were,) though he mentions only one sheriff of London. B. R. H. 299.



In trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, although he declared then that he entered for another cause. 12 Will. 3. (Com. 78.) 1 Ld. Ray. 466.

So, if a plaint was alleged, upon which *taliter processum fuit* that judgment, &c. it was not sufficient antiently. Lut. 918.

But now it is sufficient. Semb. 3 Lev. 243. R. 3 Lev. 404. Lut. 1413, 1414. Vide ante, (E 18.)

If defendant justifies under a *capias* out of a base court, in action of debt, and shews that a plaint was levied, *et taliter processum fuit*, that a *capias* [\*] issued; it is well, without shewing that a summons issued before the *capias*. 2 Wils. 5. (Com. 574.) Willes, 30. S. C. Willes, 688.

So, if it does not appear that the cause of action arose within the jurisdiction of the inferior court, it is bad. 3 Lev. 243. [Com. 574.] Willes, 30. R. cont. in Ex. M. 2 Geo.

No action lies against either the party or the officer for an arrest under the process of an inferior court, though the cause of action in the suit in the inferior court did not arise within the jurisdiction of that court. R. Ld. R. 229.

Quære. Is it necessary to state the nature and extent of the jurisdiction of the court below? Willes, 30.

And therefore, it must be alleged at what place it arose. Semb. Lut. 1413.

And though the plaint there mentions it to be *infra jurisdictionem*, it is not sufficient. R. 3 Lev. 243, 4. Cont. Lut. 937.

So, if it does not appear that the plaint was levied, or the defendant impleaded there. 3 Lev. 404.

Or, before whom the plaint was levied. R. Lut. 1526.

Or, in what county the court was. Ibid.

Or, out of what court the process issued. Lut. 1460. R. Sal. 517.

If he justifies trespass till he paid 11*l.* 10*s.* by process of execution for 11*l.* only. R. 2 Mod. 177.

So, if he alleges a mandate by the court to B., to carry to the comptroller, B. must shew that he was detained there; for that he took and detained him generally is not sufficient. R. 1 Sal. 408.

If he alleges an attachment out of an inferior court, this does not justify the carrying away goods. Mod. Ca. 71.

Yet, if the defendant justifies by process out of the Admiralty, which recites it to be a maritime cause, the defendant need not aver that the cause arose *super altum mare*. R. 2 Lev. 131.

If he justifies by process of a court leet, he need not shew that it was held by grant or prescription. R. 1 Sal. 200.

So, if the defendant pleads a judgment in B. R. he must shew where B. R. then was, for that court is removable. R. Cro. El. 504.

So, if the defendant justifies by a sheriff's warrant, he must shew his warrant specially. R. 4 Mod. 378. Vide ante, (E 17.)

And if the warrant is bad, the plaintiff shall have judgment. Semb. Ld. B. 586.

He must shew that the warrant was directed to the defendant, for to D. without saying the aforesaid D., is not sufficient. Semb. Lut. 1465.

If a warrant on a *capias* has two bailiffs' names inserted by the under-sheriff, and a blank left for a third, is sealed, and sent to plaintiff's attorney, who inserts another bailiff's name in the blank, it is a bad warrant, and no justification of the third bailiff who arrests. 2 Wils. 47.

That he is an officer, to whom the warrant ought to be directed. R. Lut. 1464.

[\*648]

If he alleges a sheriff's mandate to a bailiff of a franchise, he must say it was sealed. 2 Vent. 193.

If the sheriff or officer himself, to whom process is directed, justifies imprisonment by force of such process, he must shew the writ to be returned. 2 Rol. 563. l. 10. 20. R. 1 Sal. 409. R. 16 H. 7. 14. 21 H. 7. 22.

[\*]An officer to whom a mesne process writ which is returnable is directed, cannot justify under it after the day appointed for its return without shewing that it was returned. R. Ld. R. 632.

Any other person may. D. Ld. R. 632.

Thus where a serjeant at mace justified the replevying of goods under a precept directed to him out of the county court, the justification was held bad, because the time for returning the precept had elapsed, and the defendant did not shew that he had returned it. Ld. R. 632. P. C.

So a sheriff cannot justify under a *capias ad respondendum* after the day appointed by the writ for its return without shewing a return. D. Ld. R. 633.

But his bailiff may. D. Ld. R. 634.

So, if he justifies by *feri facias*, *pluries replevin*, or other process returnable. R. 1 Sal. 410.

But the bailiff of a franchise, need not. 2 Rol. 563. l. 25.

Nor, a bailiff who has a warrant from a sheriff, or the party, or any other who acts in aid of him. R. 2 Rol. 562. l. 45. 50. Cont. 2 Rol. 563. l. 30. 40. R. acc. Cro. Car. 446. Jon. 378. R. in C. B. M. 10 An. R. 1 Sal. 409.

So, the sheriff, or principal officer, need not in replevin, or alias; for they are not returnable. R. 1 Sal. 210.

Nor, where he pleads that the defendant was rescued, whereby he could not make a return. R. in Exch. M. 2 G. 2.

But an officer cannot justify taking upon a *habeas corpus*, after a *cepi* returned, where the party is let to bail; but he ought to aid himself upon the bail. R. 2 Rol. 558. l. 25.

So, he cannot justify by an order of Chancery, but it must be by attachment. R. 1 Mod. 272.

A warrant to arrest the party, "to the end that he may become bound, &c. to appear at the next sessions, &c." means the next session after the arrest, and not after the date of the warrant; an officer therefore executing it may justify an arrest after the sessions next ensuing the date of the warrant. 8 T. R. 110.

If defendant pleads an outlawry and warrant, he must aver that the *cap. utlagat.* was filed and remained of record, and he must say *prout papet per record.* R. on demurrer in C. B. and affirmed in error on B. R. Fort. 379.

A sheriff's officer cannot justify entering the house of a defendant under a writ of trespass *quare clausum fregit*, and continuing there till the defendant pay him a sum of money, as and by the way of surety for his appearance. 6 T. R. 137.

*Quære.* Can he justify attaching the defendant's property under such a writ? Ibid.

A plea of justification by an officer, (to trespass for taking the goods of A. B.) that he took them under a *distringas* against C. B. (meaning the said A. B.) to compel an appearance, with an averment that A. B. and C. B. are the same person, cannot be supported, unless A. B. appeared in that action, and did not plead the misnomer in abatement. 6 T. R. 234.

If he had appeared in that action, and had omitted to plead in abatement, he would have been concluded by it. Ibid. 2 Str. 1218.

"The writ ought only to have issued for so much, and the court afterwards, on motion, ordered it to be quashed," imports that it was quashed for the excess only. 15 East, 612.

{ Of justifications by officers acting under the authority of courts, magistrates, [\*549]

&c. *High v. Wilson*, 2 Johns. Rep. 46. *Beals v. Guernsey*, 8 Johns. Rep. 41, 348. 2d edit. *Wood v. Peake*, Ibid. 54. *Townsend v. Phillips*, 10 Johns. Rep. 98. *Warner v. Shed*, Ibid. 138. *Linsley v. Keys*, 5 Johns. Rep. 123. *Herrick v. Manley*, 1 Caines' Rep. 253. *Luddington v. Peck*, 2 Conn. Rep. 700. >

**[\*](3 M 25.) To trespass for cattle or goods. Distress for rent, &c.**

To trespass for taking cattle, or other goods, the defendant may plead that he took them as a distress for rent and services. *Vide ante*, (3 K 15.)

Where defendant justifies (in trespass for taking the plaintiff's goods, and converting them, &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent to plead a justification to the taking and converting all the goods, as a distress, and afterwards to say that he left part of them in the plaintiff's possession. *Willes*, 52.

Or, for a rent-charge. *Vide ante*, (3 K 18.)

Or, for rent reserved upon a lease for life or years. *Vide ante*, (3 K 19.)

Or, for relief, amerciament, &c. *Vide ante*, (3 K 17. 27, 28.)

Or, for toll. *Lut.* 1520.

For toll; without saying how much the toll was. *Bunb.* 114.

For toll or stallage in a fair or market. *Lut.* 1517. 1499.

So, he may justify as an officer by the st. 1 Ja. 22. for searching and seizing leather not tanned.

The defendant may plead that they took the goods, as searchers of tanned leather, appointed by virtue of the stat. 2 Ja. 1. c. 22. the goods being insufficient, and within the meaning of the statute, and that they had given notice of the seizure to the lord mayor, that triers might be appointed. 1 *Lutw.* 181. 2 *Lutw.* 1402.

But a plea that the defendant had seized the goods, as searchers to seize leather insufficiently dried, the goods in question being insufficiently dried in the judgment of the defendants, is bad. 6 T. R. 443.

A condemnation by four out of the six triers of leather, (the whole number being met for the purpose of trying,) must be considered as a condemnation of all six, on the principle of the act of the majority in a power of a public nature binding the minority. 1 *Bos. & Pull.* 229.

As a gamekeeper, for seizing the gun, &c. of a person not qualified. *Lut.* 1505.

For seizing a heriot, &c. due by custom. *Lut.* 1310. *Win. Ent.* 62. *Vide ante*, (3 K 28.)

That the property of the horse at the time of the surrender was not in the tenant, is a good replication. *Kit.* 271.

Where the land is copyhold.

Or, due by tenure, or reserved upon a demise.

If the defendant justifies as servant or bailiff to another, when he is not so, the plaintiff may reply *de son tort*, &c. *Cro. El.* 14.

**(3 M 26.) Damage feasant.**

So, the defendant may plead, that the place where, &c. was his freehold, and he took damage feasant. *Vide ante*, (3 K 21.)

That it was the freehold of B. and he took as his servant the cattle, &c. damage feasant.

That B. was seized and demised to him for years, who took damage feasant. *Lev. Ent.* 209.

[\*] That the plaintiff used nets to fish in his several fishery, for which he took them damage feasant. *Cro. Car.* 228.

[\*550] [\*551]

In trespass for impounding cattle, and keeping them so close that one died, not guilty, and justification for damage feasant; verdict for plaintiff on first; for defendant on second; there shall be judgment for defendant; for the justification covers the whole; the death of the beast being only gravamen, and need not be answered. Plaintiff might have had case for the death. 2 Wils. 313.

The defendant must shew by what title he was seised, or possessed; for it is not sufficient to say, that he was possessed, or that it was his close, without more. R. upon special demurrer, 4 Mod. 419. R. Lut. 1492. R. cont. 2 Mod. 70. 3 Mod. 132. if it is not trespass *quare clausum fregit*: but these cases are denied. Lut. 1492. R. Carth. 10. Salk. 642. Vide ante, (C 41.)

In trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant, the plaintiff may specially reply title in another, by whose command he entered, &c.; and it does not vitiate the replication that it unnecessarily proceeded to give colour to the defendant. 1 East, 212.

Evidence of this fact might have been given under the general replication *de injuria sua propria*. Ibid.

It is sufficient for defendant to plead that he was lawfully possessed, possession being sufficient against a wrong doer. Per Ld. K. and Lawrence, J. 1 East, 216. 218.

To this plea plaintiff may reply *de injuria* generally. Adm. 1 East, 216.

But if he replies that J. S. was seised in fee and that he entered, &c. as his servant, and the defendant traverses the seisin of J. S., which is found against him, he cannot afterwards impeach the sufficiency of the replication. R. 1 East, 212.

Though it gave the defendant colour, which was unnecessary. Ibid.

In trespass for taking cattle by one tenant in common against another, if defendant pleads that he took them damage feasant, plaintiff ought to reply specially that he was tenant in common with defendant and not reply generally *de injuria*. 1 East, 218, 219.

In trespass for taking cattle, defendant pleaded that he was lawfully possessed of the croft, and because the cattle were damage feasant he took them. Replication, that A. F. was seised in fee, that she married T. M., that they had issue; that A. F. died, that T. M. was entitled for life by the curtesy, and that plaintiff put the cattle in by his command; that they continued therein until defendant claiming under a charter of demise (whereas nothing passed by it), entered, &c. Defendant traversed the seisin of A. F. which was found against him, after which R. N. to arrest the judgment on the ground that the replication was bad; but on C. S. the court held it good, and R. D. 1 East, 212. P. C.

But the defendant cannot justify destroying the goods, &c. found damage feasant.

Nor, the cutting nets or oars to prevent fishing in his fishery. R. Cro. Car. 228.

Nor, chasing of ewes whereby *deteriorat. fuerunt*. R. 3 Leo. 15.

Nor, cutting the wood of a seat erected in a church without license, &c. though removed by the churchwardens. R. Noy, 108.

In trespass for breaking and entering a house, and taking away goods, and converting them to his own use; if defendant pleads, that he took them damage feasant, and removed them to the pound, and left them for plaintiff's [\*]use, it is bad; for it is no answer to the conversion to his own use. Fort. 381.

It is a good replication, that after the taking damage feasant, defendant converted the beast to his own use. 3 Wils. 20.

So, the plaintiff to a taking damage feasant, may say that the taking was in another place. R. 2 Cro. 141.

**(3 M 27.) For prevention of damage.**

So, the defendant may plead that he took to avoid damage otherwise inevitable: as, that he took out of the house to preserve from fire. Semb. 21 H. 7. 27. b. Vide Trespass, (D.)

That he chased cattle damage feasant with a dog. R. 4 Co. 38. 2 Rol. 566. l. 20. R. Jon. 131. Poph. 162. Vide post, (3 M 38.)

That he removed iron, &c. which the plaintiff had broke down his fences, &c. with, and left upon his land, to the land of the plaintiff, and gave him notice thereof; for he need not take it damage feasant and impound it. R. 2 Rol. 566. l. 35.

But it is no plea that he took for the safety of his goods, where the owner may have remedy if they are destroyed; as, that he took corn, severed for tithes, and carried them to the barn of the plaintiff, the parson, to save them from the cattle going in the same close. R. 21 H. 7. 27. b.

That he took the plaintiff's horse going in the field for fear it should be stolen. Ibid.

**(3 M 28.) Default of the plaintiff himself.**

So, the defendant may justify for the plaintiff's own default: as, if the plaintiff puts his grain or money with those of the defendant, he may justify taking the whole. R. 2 Rol. 566. l. 15. 2 Bul. 323. 2 Cro. 366.

Or, if the plaintiff takes a handful of grain from the defendant and mixes with his own, the defendant may take a handful of his. 2 Rol. 566. l. 12.

So, if before execution against A. he puts the goods of B. amongst his by covin, that an action may be brought for the taking by B. Per Ley, C. J. 2 Rol. 393.

If in trespass for breaking down and carrying away a gate, the defendant justify, and conclude that he deposited the gate in a convenient place for the use of the plaintiffs, to which the plaintiff, to make him a trespasser *ab initio*, replies a subsequent conversion; the replication is not supported by proof that the defendant placed the gate upon his own land, since even supposing that to be a conversion, the plaintiff has acknowledged that the defendant was right in so doing, by not denying and therefore admitting the conclusion of the plea. 4 T. R. 364.

**(3 M 29.) Defect of fences.**

So, the defendant may plead that the defendant by prescription ought to repair the fences between the closes of the plaintiff and defendant, and for want of repair his cattle escaped and did the damage alleged. 19 H. 8. 6. a. 2 Rol. 565. l. 30. Tho. Ent. 304.

[\*] That the plaintiff ought to repair the fences between his close and the highway, and for want thereof his cattle escaped out of the highway. 10 Ed. 4. 7. b.

Or, between his close and the place where the defendant has common. Win. 996. or 1110. edit. 1680. Lut. 1357.

Any one occupying a close, the owners of which are bound to maintain the fence which divides it from another's, is liable to the neighbouring landholder, if the fence goes to decay, whatever agreement he may have made with his landlord about repairing it. 4 T. R. 318.

If, by agreement between the landlord and tenant, the landlord is bound to repair a dividing fence, an action lies against him for the consequences of allowing it to go to decay. 2 H. B. 349.

One bound to repair a dividing fence has not therefore a right to cut the ditch into the neighbouring land. 3 Taunt. 137.

[\*553]



If neither of the owners of closes which adjoin, is bound to maintain the dividing fence, each is liable as a trespasser, if his cattle escape into the other's close. 1 Taunt. 529.

That the plaintiff, or a stranger by his command, threw down the fences, whereby the cattle escaped.

And it is sufficient for the defendant to say that he is possessed of a close adjoining to the plaintiff's close, without saying by what title, or for what term. R. Yel. 74.

That all occupiers ought to repair. Semb. 1 Sal. 357. 1 Vent. 97. Ray. 192.

So, the defendant may justify entering to re chase cattle that escaped for want of fences. 2 Rol. 565. l. 35. 40.

But it is not sufficient to say the plaintiff *reparare debet*, without shewing by what title, to wit, by prescription, or otherwise. R. Yel. 75.

That by agreement the plaintiff ought to repair; for he may have a remedy upon his covenant. Per three J. Cro. El. 709.

So, it is no plea, if he suffers his cattle to continue there after notice, though the fences are not in repair. Semb. 2 Leo. 93.

Or, if his cattle escape out of the highway into his land, because there is no fence; if he is not bound to maintain it. 2 Rol. 565. l. 47.

So, he cannot allege a custom to repair, but must prescribe that such an one ought. 1 Vent. 97.

So, it is no plea, that a forester, &c. entered to re chase deer, &c. that escaped by the plaintiff's neglect in maintaining the fence, &c. for when it is out of the forest, park, &c. the property is gone. R. Kelw. 30. Manw. 106.

{ In trespass by cattle, the defendant may shew, that the fence, which the plaintiff was bound to repair, was defective. Colden v. Eldred, 15 Johns. Rep. 220.

Trespass will lie, where the defendant's cattle entered upon the uninclosed field of the defendant, and destroyed his herbage, &c. there being no regulations of the town, as to fences, or as to cattle running at large. Wells v. Howell, 19 Johns. Rep. 385. }

### Replication.

To this plea the plaintiff may reply *de son tort*, and traverse the prescription. Rast. 621. b.

Or, *de son tort*, and traverse the want of repair. Win. 999. (or 1113. edit. 1680.)

Or, *de son tort*, and traverse the escape *modo & forma*. R. Lut. 1358, 9.

Or, *de son tort demesne* generally. Rast. 621. a.

[\*]So, that the fences were sufficient, but the defendant's cattle threw down all the fences. Ibid.

### (3 M 30.) Necessity.

So, the defendant may justify for unavoidable necessity: as, that he threw goods (being in a common barge upon the Thames) into the water, in a tempest, to save the passengers' lives. R. 2 Rol. 567. l. 5. R. 12 Co. 63.

That he pulled down the house to extinguish the fire. 12 Co. 63. Vide ante, (3 M 20.)

### (8 M 31.) Involuntary accident.

So, the defendant may plead that it was not in his power to prevent it;

as, that the cattle going in the road by the plaintiff's close *raptim & sparsim* against his will, depastured the plaintiff's grass or corn. 2 Rol. 566. l. ult.

That he chased sheep mixt with his own to a place where he might separate them. Per Rede, 21 H. 7. 28. a. Latch, 13.

That the executor took goods mixt with the testator's goods, till he had knowledge of the mistake. 21 H. 7. 28. a.

So, the defendant may plead, that his dog chased the plaintiff's sheep out of his land, and pursued them against his will into the plaintiff's land. R. Lut. 13. 119.

That a horse, being unruly, violently carried the plough into the plaintiff's land adjoining. Latch, 13.

That trees were blown down by the wind into the plaintiff's land, and he entered to remove them. Ibid.

That driving sheep in the highway, they against his will escaped into the plaintiff's land. Ibid.

That fruit fell from his trees into another's land adjoining, and he picked it up. Latch, 120.

But it is no plea, if the accident was by a voluntary act, or neglect of the defendant; as, if a man lets a falcon go at a pheasant in his own land, and pursues it into the land of another, trespass lies. Latch, 13.

If he cuts down a tree, which falls into another's land, and he enters to remove it. Ibid.

### [(3 M 31. a.) Title.]

In trespass to personal property, the plea may controvert the title to the possession of land. 1 East, 212.

### (3 M 32.) To trespass *pro bonis cum uxore abductis*.

To trespass for taking goods, *cum uxor*. the defendant may plead that she was the wife of the defendant. 2 Rol. 551. l. 10.

That he took her by leave of her husband. R. 1 Ed. 4. 1. a.

But the defendant cannot plead *ne unques accouple*. 2 Rol. 551. l. 5.

### [\*](3 M 33.) To trespass for killing a dog, &c.

So, to trespass for killing his dog, the defendant may plead that the dog chased the conies in his warren, &c. R. 2 Cro. 44. Agreed, 1 Sid. 336. Cont. 2 Rol. 567. l. 35.

Or that he killed the deer in his park. 3 Lev. 28. 35.

{ Or, that he was killing fowls, or other reclaimed and useful animals. Leonard v. Wilkins, 9 Johns. Rep. 233.

Or, that he assaulted the defendant in the highway. Credit v. Brown, 10 Johns. Rep. 365. }

And, he need not say that the plaintiff knew of the quality of the dog to haunt the warren, &c. 2 Cro. 45.

Or, that there was a necessity to kill it. 1 Sid. 336. 3 Lev. 28.

{ As, where the dog had been bitten by another animal affected with the *hydrophobia*. Putman v. Payne, 13 Johns. Rep. 312.

Or, where he is ferocious and dangerous, and is permitted to go at large by his owner, after notice of his ferocity. Ibid. }

So, the defendant may plead that the plaintiff's mastiff came into the defendant's court, to the terror of his family, and therefore he killed it. R. Lut. 1494.

[\*555]

Or, fastened upon his dog, and he could not otherwise part them. Adm. 1 Sand. 84.

But if the defendant pleads, that the plaintiff's dog fastened upon the defendant's dog, for which he killed it, he must shew that he could not otherwise part them. R. 1 Sid. 336. 1 Sand. 84.

So, it is no plea, that the dog chased a hare into his land, and therefore he killed, or took it. R. 2 Cro. 463.

A plea which justifies killing a dog because chasing hares, must at any rate aver that they could not otherwise have been saved. 11 East, 568.

So, if the plaintiff replies, that he chased conies, deer, &c. in his own land, and the dog pursued into the park, &c. he must say he endeavoured to restrain him from going into the park. &c. R. 3 Lev. 28.

If a deer be out of a forest, the owner of the land where it is may hunt it to the forest; but when it gets to the forest, he ought to call in his dogs. D. Poph. 162.

So, if trespass be for taking a dog with a collar, it is no bar to say he was coursing a hare in his soil, and he took him, and led him away. R. 2 Cro. 463.

**(3 M 34.) To trespass *quare clausum fregit*.—The common bar.**

To trespass *quare clausum aut domum fregit*, &c. the defendant may plead the common bar, viz. that the close or house in the declaration was the defendant's own freehold. Win. Ent. 961. (or 1077. edit. 1680.) 14 H. 8. 24. b. Supra, (3 M 11.)

No man who has a right of entry can be considered as a trespasser for entering, unless his entry is attended with such acts of violence as would subject him to a criminal prosecution. Per Ashurst, 296. 3 T. R.

*Quære.* When the plaintiff names his close in the declaration, can the defendant plead this plea? Willes, 218.

If the defendant pleads the common bar, he must name the lands, which are his freehold, otherwise, if the plaintiff has lands in the same place, as well as the defendant, the trespass cannot be proved in the defendant's land, for it shall be intended in the plaintiff's land, and he shall not be put to a new assignment till the defendant ascertains another place by name. R. Dy. 23. b.

Yet if trespass is *quare clausum* in D. &c. it is sufficient for the defendant to prove that he has a freehold in D. Sal. 453.

{ In trespass *quare clausum fregit*, where several trespasses, in several closes, were alleged, at different times, the plea was, that these several closes were one and the same close, and that the same was his freehold, &c. this plea is bad: the defendant should have justified as to all the closes, or have denied the trespasses, as to all the closes. except one, and justified as to that. Nevins v. Keeler, 6 Johns. Rep. 63. }

[\*] If it is *quare clausum vocat*. A. in D. he must prove title in a close of the same name. Ibid.

If upon the common bar there is a new assignment, where it is not necessary, it will be good by the statute of *jeofaile* after verdict. R. Brownl. 200.

So, a new assignment may be made, though the defendant justifies in the former place. R. Sal. 453.

To freehold pleaded, the plaintiff may say that before the defendant had any thing, A. being seised, leased to him. Jon. 352.

But if to a common bar, the plaintiff replies, that the place is such, the

defendant cannot rejoin that it is the same place as in the bar ; for the replication says *al.* than in bar, and therefore the plaintiff will be estopped to give evidence of a trespass there. R. Cro. El. 492.

So, if trespass be for goods taken in D. the defendant cannot plead the common bar ; for D. is named only for a venue. R. upon general demurrer. Sal. 453. Mod. Ca. 117. Carth. 176.

If the defendant agrees in the name of the place, and varies in quantity, or other description, the plaintiff cannot assign a different quantity to the place where, &c. but must say there are two places of such name, &c. and that the trespass was in this. R. Yel. 166. Cro. El. 897.

If the defendant names a place, which contains the land in the declaration and more, the plaintiff shall say that the trespass was in such land, without answering to the other quantity. R. 27 H. 8. 22.

If the declaration is, in a market in B. if the defendant justifies in B. it is sufficient, though he does not answer to the market ; for if the place makes the justification bad, the plaintiff must shew it. R. 2 Jon. 207.

If the common bar is pleaded, the plaintiff may reply that it is his freehold, and join issue upon it. Ast. Ent. 504. for per two J. Hought. cont. 2 Cro. 594. he cannot traverse that it is the defendant's freehold. So, by Levinz, Lut. 1401. 1419. 27 H. 8. 22. b.

The plaintiff may reply that the place in question is the soil and freehold of the plaintiff, and not the soil and freehold of the defendant. Willes, 218.

Or, may make a new assignment of the place, where the trespass was done. 2 Cro. 594.

If the writ is general, and the declaration for *una roda terræ*, by a new assignment he may say an acre. Win. Rep. 65.

If the declaration is *quare clausum fregit*, a new assignment in a barn, &c, is bad. 4 Leo. 16.

But *quare domum fregit* is sufficient for a barn, &c. Ibid. 2 Leo. 185.

The new assignment must ascertain the place, and therefore two acres of land, *sive prati*, is bad. R. Dy. 264. a. Bendl. pl. 222. 1 And. 31.

So, if it does not give a name to the place, or the abutments, it is bad. Semb. Dy. 264. a.

And if it gives the abutments, they must be proved. Semb. Dy. 161. b.

[\*] There can only be a new assignment where there is a special plea. 1 T. R. 479.

Where the plea has completely answered, and is fitted to every item of the complaint, the plaintiff cannot, after replying to the defence, newly assign. 10 East, 73.

The use of a second count is to avoid the necessity of a new assignment, though it does not in all cases supersede it. 1 T. R. 479.

If a declaration contains two counts, to one of which the general issue is pleaded, and to the other a special plea, to which there is a new assignment, the plaintiff cannot, on failing in the proof of his new assignment, give the cause thereby intended in evidence under the second count. 2 T. R. 172.

A plaintiff, by new assigning to a special plea, admits that he does not go for the cause therein specified ; so that he cannot give that cause in evidence under a second count to which the general issue is pleaded. 2 T. R. 172.

Semble, that if a plaintiff in an action of trespass against two new assigns a joint trespass by both, he cannot recover against one defendant on the new assignment, by proving an act of trespass by him alone. 2 T. R. 172.

To a new assignment the defendant may plead, not guilty, or justify. 14 H. 8. 4. a.

And may justify for another cause than his bar. R. Mo. 540.

To the new assignment the defendant must plead, not guilty, or justify ;

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for he cannot say that the place assigned and the place in bar are the same. R. Dy. 161. b. in marg. R. Mo. 463.

(3 M 85.) License.

So, to *clausum fregit* the defendant may plead, entry by the plaintiff's license. Win. Ent. 1099.

If A. license B. to enter his house to sell goods, B. may take assistants, if necessary, for the purpose of selling them. Willes, 195.

And if it be pleaded that B. and also C. and D. his servants, and by his command, entered for that purpose, and necessarily continued there so long, it will be understood, that it was necessary for them all to enter. Ibid.

And license at a day before is sufficient, without saying it continued ; for it shall be intended, if the contrary does not appear. Semb. Cart. 218.

So, license by the plaintiff may be given in evidence upon not guilty. Per Rede, 21 H. 7. 28. a. 2 T. R. 166.

So, he may plead license by the bailiff of the owner, and it will be aided after verdict. R. 2 Cro. 377.

So, an implied license : as entry *ad auxilium in puerperio ferend.*

Continuance after the death of lessee for life for six days, before which time he could not remove. R. 2 Cro. 204.

So, if A. licenses B. to put trees, &c. in his garden, and afterwards sells the garden to D. who continues them there without seizure. Mod. Ca. 171.

Or, license by law ; as that *domus fuit communis taberna*. Win. Ent. 1087, 1088. 1097.

That he entered to shew the sheriff the cattle upon replevin, 2 Rol. 553. l. 12. Vide post, (3 M 39.)

To view waste.

So, for breaking, &c. a man's house, and debauching his daughter, *per quod* [\*]*servitium amisit*, license to enter, if pleaded, is a good bar, but cannot be given in evidence under the general issue. 2 T. R. 166.

But entry by license of the plaintiff's wife, or servant, is not sufficient. R. Cro. El. 876.

Nor, entry to take his goods, or his falcon that pursued a pheasant there. R. 2 Rol. 567. l. 30. Vide post, (3 M 39.)

Nor, entry to visit his sick daughter, being servant to the plaintiff. R. 2 Rol. 567. l. 20.

Or, to demand his debt, if he does not say that the owner was then there. R. Cro. El. 876.

So, the license will be determined by sale of the land wherein it was given. Per Holt, Mod. Ca. 171.

License to be exercised upon land for twenty-one years, grantable upon deed and without writing. 7 Taunt. 874.

Whilst a license continues in its nature revocable, it may be revoked. 4 T. R. 78.

Even admitting that in general a license, when executed, cannot be countermanded ; yet if a rule of law would be transgressed by holding an executed license irrevocable, it cannot be done. Hence, where A. agreed for a certain consideration with B., to let him have a tunnel in his land, but of which no regular conveyance was made by the former to the latter ; held, that as no title to the realty could pass by a parol license or contract, (to convey which was the object of the present license,) the permission was revocable at the will of the grantor. 4 East, 107.

Where a license is carried into effect, it can only be rescinded by placing the other side, or furnishing him with the means of placing himself in the same situation in which he stood before he entered on its execution. 8 East, 308.



{ A mere licence to cut timber, is revocable ; and if the defendant proceed to cut timber after notice of a revocation he will be liable in trespass, unless the licence may amount to a valid agreement. *Tillotson v. Preston*, 7 Johns. Rep. 285.

An agreement for the purchase of land, is not, of itself, a licence to enter ; and a licence to enter, does not imply a permission to cut timber. *Suffern v. Townsend*, 9 Johns. Rep. 35. Vide *Cooper v. Stower*, 9 Johns. Rep. 331. *Ives v. Ives*, 13 Johns. Rep. 235.

A licence to enter cannot be given in evidence under the general issue, in *quare clausum fregit* ; it must be pleaded. *Gambling v. Prince*, 2 Nott & M'Cord, 138.

The defendant in trespass *quare clausum fregit*, cannot justify under a licence which is void. *Chandler v. Edson*, 9 Johns. Rep. 362. }

### (3 M 36.) Tender of amends.

So, to an involuntary trespass the defendant may plead a tender or sufficient amends. 1 Bro. Ent. 332. Tho. Ent. 304.

And by the st. 21 Ja. 16. to trespass *quare clausum fregit*, the defendant, disclaiming title to the land, and shewing it to be an involuntary trespass may plead tender at any time before action brought.

So, to a negligent trespass by escape of cattle, &c. 2 Rol. 570. l. 20.

But tender after action brought is too late.

So, after a *latitat* sued out ; for the plaintiff may by his replication aver that he sued out a *latitat* with intent to declare in trespass. R. Cro. Car. 264. 1 Rol. 538. l. 3.

So, to avowry for damage feasant in replevin, tender must be pleaded before impounding ; for it is not within the st. 21 Ja. 16. which goes only to trespass. R. Lut. 1596.

So, tender must be of a sum certain : for he is a wrong doer. Sal. 686.

So, to a voluntary trespass, tender before action brought is no plea : as, for putting cattle in his close. R. 2 Rol. 570. l. 25. Noy, 12.

Or, for breaking his hedges, &c. 2 Rol. 570. l. 25.

So, to trespass by mistake, tender before action is no plea ; for, if the act was voluntary, it cannot be known whether it was by mistake, [\*] or how intended : as, that he cut down the plaintiff's hay by mistake for his own. R. 3 Lev. 37.

It cannot be pleaded in trespass for taking goods. Str. 549.

To tender of amends the plaintiff may reply *quod non obtulit*. Tho. Ent. 304.

Or, that the amends were not sufficient.

### (3 M 37.) Public good.

So, the defendant may justify a private trespass for the public good : as entering the plaintiff's close to make a bulwark in defence of the king and kingdom. 21 H. 7. 27. b.

Pulling down a house to save others from fire. 21 H. 7. 27. b. 2 Rol. 566. l. 42.

To remove a nuisance. Sal. 458.

So, an entry upon fresh suit of a felon, or goods stolen. 2 Rol. 564. l. 42.

Or, to make a distress. 2 Rol. 566. l. 10.

In such case he need not say he did as little damage as possible. R. Sal. 458, 9.

But he cannot justify entering a close, or digging up the soil to hunt or [\*559]

take a fox, badger, &c. though it be for the public good. R. 2 Rol. 558. l. 10. D. cont. Lut. 120. R. acc. 2 Bul. 60.

But a person may justify trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. 1 T. R. 334.

Nor, entry to take his goods, which a trespasser carried to B.'s house. R. 2 Rol. 564. l. 35. D. Mo. 20.

Or, to search for his goods stolen, in another's land. R. 2 Rol. 565. l. 15. 1 Brownl. 199.

### (3 M 38.) Prevention of damage to himself.

So, he may justify for removal of a trespass from himself, though damage thereby happens to another : as, if A. erects a dam, wall, &c. upon his soil, and the soil of B. if B. throws down the wall upon his soil, it will be well, though thereby the whole wall, &c. upon the soil of A. also falls. R. Cro. El. 269.

So he may enter the land of another to remove a nuisance there to himself. 2 Rol. 565. l. 50.

He may break a house where he is wrongfully imprisoned, to make his escape. 2 Rol. 566. l. 5. Vide Execution, (C 5.)

He may chase cattle damage feasant with a dog to remove them. 2 Rol. 566. l. 20.

But it is no plea that he took the plaintiff's horse to fly from the assault of B. and others. Ray. 423.

### (3 M 39.) Using or securing his property.

So, the defendant may justify an act for the security of his estate, or interest : as, if he has a fishery in another's soil, he may justify putting pales, or other things there. 2 Rol. 564. l. 27.

It is not a good justification that J. S. was possessed of a piece of timber [\*] which was placed in the *locus in quo* by a tempestuous wind, and that defendant entered as servant to carry it away, because it does not appear but that the timber might have been purposely exposed to the wind in such a manner as to make the wind blow it into the plaintiff's close, because it does not appear to have been fetched away in a proper time, because it does not appear the timber belonged to J. S. when it was blown over, and because it does not appear the plaintiff was requested to permit the removal. 2 F. 183.

But it is a good justification that the defendant was cutting one of his trees, and that a bough of it accidentally, and notwithstanding his endeavour to prevent it, fell into the plaintiff's close, and that the defendant entered to carry it away. Semb. 2 F. 184.

If A. takes B.'s goods, B. may justify the taking, though there is an alteration of the form : as, if timber taken is cut into boards. R. Mo. 19.

If cloth is made into clothes. Mo. 20.

So, if a man has goods, timber, &c. in a house or upon the land of another, his executor may justify the taking. 2 Rol. 564. l. 25.

If a trespasser puts the goods upon his own land, the owner may enter to take them. 2 Rol. 565. l. ult. 2 Rol. 56.

Otherwise, if a tenant in common takes all the goods which he has in commons, and puts them on his separate land, the other cannot enter his separate land to retake them, though he may retake his part, where he can do it without a trespass. R. 2 Rol. 560. l. 30.

So, the vendee of goods, timber, &c. may justify an entry to take them. 2 Rol. 567. l. 40.

So, the owner of a water-pipe by grant or prescription, &c. may justify entering into the land where it lies, to repair it. R. 2 Rol. 567. l. 45. 50.

So, a forester may justify entering into land, next the forest, by prescription to re chase deer to the forest. R. 13 H. 7. 16.

So, if goods are stolen and left in B.'s house, the owner may enter to take them. 2 Rol. 55, 6.

So, a sheriff or his officer may enter, where the door is open, to do execution upon the goods there. R. Cro. El. 759.

So, A. may justify entering the house of B. then there to demand his debt of him. Semb. Cro. El. 876.

But if A.'s goods are in B.'s house or land without his own act, A. cannot justify entering to take them, without B.'s licence. Semb. Cro. El. 246. R. 2 Rol. 55. Vide supra. { Vide *Heermance v. Vernoy*, 6 Johns. Rep. 5. *Blake v. Jerome*, 14 Johns. Rep. 406. }

Though he has licence from B.'s wife in his absence. R. per three J. Cro. El. 246.

So, he cannot take his goods where they are substantially altered; as, if timber is used to build a house. Mo. 20.

So, if the defendant has a right to dig and take clay, &c. as tenant, he cannot take that dug by another, though no tenant. R. Cro. El. 434.

### (3 M 40.) Title with colour to the plaintiff.—When colour shall be given.

So, the defendant may plead title in himself by descent, fine, feoffment, devise, &c. and give colour to the plaintiff.

Colour is a feigned title given by the defendant to the plaintiff in [\*]assise, trespass, &c. when the defendant would refer his title to the court without sending it to *lay gens*; for without such colour his plea will amount to the general issue. D. & St. l. 2. c. 53. R. 10 Co. 90. Dr. Leyfield.

And colour must be always given, when the defendant's plea goes only to the possession; for, notwithstanding, a right may remain in the plaintiff: as, if the defendant pleads a descent. 10 Co. 90. b.

So, if the defendant pleads that A. was seised in fee or of the freehold, and he as servant and by his command entered; for the plaintiff may have a right by lease for years or otherwise. 10 Co. 89. b. Cro. El. 76.

So, if the defendant pleads that the goods were waived in his manor, or sold in market overt, being stolen *de quodam ignoto*, he shall give colour; for *iste ignotus* perhaps was the plaintiff. 10 Co. 90. b.

But when the defendant's plea bars the plaintiff's right and property, no colour is necessary: as, if the defendant pleads a collateral warranty, and relies upon it. 10 Co. 90. a.

In trespass for taking goods, a justification denying the plaintiff's right of property must give him colour. R. Ld. R. 218.

Thus a justification for taking goods, stating that they belonged to J. S., that the plaintiff took and impounded them, that a replevin was granted of them, and that the defendant, as bailiff, replevied them, was held bad for want of giving the plaintiff colour. Ld. R. 218. P. C.

Or, an estoppel, or fine with proclamations. Ibid.

Or, an act of parliament; for in these cases the plaintiff will be barred, though he had a right before. 10 Co. 90. b.

So, if the plea bars the plaintiff and his blood for ever. Ibid.

So, if the plea goes to the plaintiff's right or property: as, if the defend-

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ant pleads that A. was possessed of goods, and sold them in market overt, there needs no colour; for the plea avoids the plaintiff's property. *Ibid.*

Or, that A. was possessed, and B. stole and waived them in his manor. 10 Co. 90. b.

That the goods were wreck. *Ibid.*

That they were tithes severed from the nine parts: for this takes away the property of every other. R. 10 Co. 91. a.

So, that A. enfeoffed B., and he as his servant entered; for when he shews how A., who had the fee or freehold, was entitled, the right shall not be intended in the plaintiff. 10 Co. 90. a.

That A. lord of the manor approved the common, is a good plea to an assise for common, without colour.

So, if the defendant entitles him by the plaintiff himself, colour is not necessary. 10 Co. 91. a.

As, by a lease for life or years from the plaintiff.

So, if the plea is to the writ or the action of the writ, colour is not necessary. 10 Co. 91. a.

So, if the defendant pleads a general bar, no colour is necessary.

So, where the defendant admits that the plaintiff had an estate, which is now defeated by condition, entry, &c.

In trespass, if plaintiff declares on his possession, and defendant makes title, and gives colour, and plaintiff replies *de injuria*, &c. and traverses defendant's title, it is sufficient; for he need not reply a title, possession being enough against wrongdoer. Str. 1238.

### [\*](3 M 41.) What colour shall be good.

Every colour must be matter of law, which does not lie in the knowledge of *lay gens*; as, a claim by colour of a charter of feoffment by which nothing passed, &c. 10 Co. 91. b. 2 Cro. 122.

By a grant of a reversion to which there was no attornment. 2 Cro. 122.

So, it must be a matter which would be a good title if it was real. 10 Co. 91. b.

It must be matter which has the appearance of a continuing title; and therefore, if it is by colour of a lease for the life of A. it must say, now living; for if he is dead, there is no appearance of title. 10 Co. 91. b.

So, colour must be given from him who first conveyed, otherwise all prior conveyances are waived. 10 Co. 89. 91. b.

But default of colour is form only, and aided upon a general demurrer. R. 2 Cro. 229.

Or by a replication. R. Ld. R. 551.

So, if the defendant gives the plaintiff a real title, it is bad; for it ought to be colour of title only: as, in trespass for goods, if the defendant pleads that A. possessed gave them by deed to the plaintiff, who claiming by it, the defendant retook them, it is bad; for a gift by deed is a good title. R. 2 Cro. 122.

So, if the defendant pleads that the plaintiff by colour of a lease for years, &c.; for a lease gives a title to the possession. *Ibid.*

By colour of letters patent. *Ibid.*

### (3 M 42.) Other justifications.

So, the defendant may justify trespass *quare clausum* or *domum fregit*, by entry to execute process. *Vide ante*, (3 M 24.)

Or to make a distress. Vide ante, (3 M 25.)

To make use of his way. Lut. 1427. { Vide Strout v. Berry, 7 Mass. Rep. 385. }

In the highway. Win. 1004. Vide Chimin, (D 1, 2.) Vide ante, (3 K 25.) { Vide Colden v. Thurber, 2 Johns. Rep. 424. }

So the use of a crain erected on a public quay, for the public have a right to use it. 8 T. R. 606.

In such a justification it is sufficient to say, that it is "a public, open, and lawful wharf," without claiming the right by immemorial usage. Ibid.

Showing that the plaintiff was possessed, gives him sufficient colour in trespass. Semb. Ld. R. 218.

But in trespass for taking cattle, shewing that the plaintiff took and impounded them, does not give the plaintiff sufficient colour, for it does not admit that he ever was possessed. R. Ld. R. 218.

Or, common.—The defendants justified in trespass under a right of common of pasture; the plaintiff replied an inclosure and approvement of the place where, &c. by the lord of the manor, averring a sufficiency of common left for the defendant, "and all other persons of right having and using common," &c.; the defendant traversed the sufficiency in those words; and after verdict for the plaintiff on an issue on that traverse, the court refused to grant a repleader, saying those words meant "all persons having a right to use the common." Willes, 532. Vide Common, (F 1, &c.)—Vide ante, (3 K 24.)

To make perambulation. Co. Ent. 651. b.

[\*]To take his corn, cattle, &c.

To repair his house, watercourse, &c. or to remove a nuisance.

To fish in his several or free fishery. Hard. 407. Vide Piscary, (A—B.)

So, the defendant may justify by command of another defendant who pleads not guilty; for his plea shall not take away from his servant his justification. R. 2 Mod. 67.

So, to trespass by B., the defendant may plead in bar a recovery by himself against him in ejectment. R. 1 Leo. 313. 3 Leo. 104.

Or, a recovery or bar in another action for the same trespass. Vide Action, (K 1, &c.)

If the defendant justifies by title to a manor, house, &c. it is not sufficient to say *unde locus in quo*, &c. is parcel, without saying that *fuit tempore transgressionis supposit*. 1 Leo. 75.

If the *locus in quo*, in trespass *quare clausum*, &c. is the inheritance of the crown, (as Windsor Great Park,) defendant, on not guilty pleaded, cannot give in evidence that it was a common highway. Bunb. 259.

Bail above may justify the breaking and entering the house of A., (the outer door being open,) in which the principal resides, in order to seek for him, for the purpose of rendering him. 2 H. Bl. 120.

Such a justification is good, without averring that the principal was in the house at the time. Ibid.

And in such a plea an averment that the defendant duly became bail and entered into a recognizance, is sufficient, without stating that the principal was delivered to their custody. Ibid.

Semb. that a sheriff's officer, acting under civil process, may justify breaking the inner doors of the defendant's house, though he be not therein at the time, if the officer have first demanded admittance. 3 Bos. & Pull. 223.

Justification under a custom for all the inhabitants to walk and ride over a close of arable land at all seasonable times in the year, was holden bad, because it appeared that the trespass was committed when the corn was standing, though the defendant averred it was a seasonable time. Willes, 202.

What is a seasonable time is partly a question of law, and partly of fact. Ibid.

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A replication to a plea of prescriptive right appurtenant, denying the right, does not involve the defendant's possession of the land to which, &c. 16 East, 343.

A replication, in trespass to real property, traversing the command, &c. is allowable. 11 East, 65.

So, in trespass *quare clausum fregit*, where the plaintiff has a naked possession only, the defendant, having the right of possession, may justify an entry to turn out the plaintiff. *Hyatt v. Wood*, 4 Johns. Rep. 150. Vide *Wood v. Hyatt*, Ib. 313. *Douglass v. Valentine*, 7 Johns. Rep. 273. *Ives v. Ives*, 13 Johns. Rep. 235.

Instructions from the secretary of the navy, to take, and send in neutral vessels, under certain circumstances, will justify the commander of an armed ship, in detaining a vessel, and taking her out of her course, provided he acts with good faith. *Ruan v. Perry*, 3 Caines' Rep. 120.

In a justification in trespass for taking the plaintiff's goods, under a writ of replevin, it must be alleged, that a hand was given, and that the goods were not detained upon mesne process, &c. *Moors v. Parker*, 3 Mass. Rep. 310.

In trespass for debauching and begetting a daughter with child, her want of chastity is no defence, unless it be shewn, that the father connived at her criminal intercourse. *Akerly v. Haines*, 2 Caines' Rep. 291.

Probable cause of seizure will not justify a custom-house officer for taking goods, where his proceedings are not protected by the authority under which he acts. *Im-lay v. Sands*, 1 Caines' Rep. 566. Vide *Van Brunt v. Schenck*, 13 Johns. Rep. 414. *Gelston v. Hoyt*, 13 Johns. Rep. 561. *Palmer v. Allen*, 5 Day, 193.

The command of a superior to commit a trespass, is not a justification to the inferior. *Brown v. Howard*, 14 Johns. Rep. 119. >

### [(§ M 43.) New assignment.]

The defendant is entitled to a verdict on not guilty, to a new assignment in trespass setting out to the *locus in quo* by abutments, and averring that it is different from that mentioned in the plea, which claimed under an allotment by the leet jury, if in truth it is the same. 15 East, 285.

A new assignment is proper, not where only one act of trespass has been committed, and the defendant's attempt to justify such act cannot be supported. 16 East, 82. 7 Taunt. 156.

If a defendant by the abuse of an authority in law has made himself a trespasser *ab initio*, and the plaintiff declares in the same court, first, for the original act, which might have been justified, had not the authority been deviated from, and then for the subsequent outrage or abuse, the defendant by justifying the previous act under the authority in law, answers the entire cause of complaint, and the plaintiff, in order to cut down the defence, must reply the subsequent abuse. 3 T. R. 292. 1 H. B. 555.

[\*]If a trespass was greater than the occasion rendered necessary, the plaintiff where the abuse was of an authority in law, will reply the excess. 2 Wils. 313. 3 Wils. 20. 5 Taunt. 69. Otherwise he will newly assign it. 8 T. R. 78.

Where the defendant having justified an entry with which he was charged under *fi. fa.*, the plaintiff replied by taking issue on the plea, and also newly assigning an entry, after the return of the writ; on special demurrer, the defendant had judgment. 10 East, 73.

Trespass for breaking the plaintiff's close on such a day, and on divers other days, within a given period; plea of license at the said several times; replication traversing that he entered by license at the said several times. Proof by plaintiff, of four acts of trespass, and by defendant of a license, which covered only two. Held, that plaintiff should recover for the other two. 11 East, 451. Vide *supra*.

< To a plea of *liberum tenementum*, if the plaintiff conclude his replication with an averment, it is fatal, on special demurrer; he should new assign. *Hallock v. Robinson*, 2 Caines' Rep. 233. >

## (3 N) PLEADING IN WARRANTIA CHARTÆ.

## (3 N 1.) When it lies.

A writ of *warrantia chartæ* lies when a man by deed enfeoffs another with warranty, the feoffee may have this writ against the feoffor or his heir. F. N. B. 134. D.

And the writ says, *quod juste warrantizet manerium de D. quod tenet & tenere de eo clamat, & unde chartam suam habet, or chartam A. patris sui cuius hæres ipse est, &c.* Ibid. E.

But it is not material whether he holds of the defendant or another. Ibid.

So, it is not necessary that the plaintiff had a charter of warranty, though the form is such; for the plaintiff shall have a *warrantia chartæ*, where he holds by homage ~~ancestral~~, which imports warranty. Ibid. F.

Or, if he claims by exchange, without express warranty in the deed. Q. F. N. B. 135. B.

So, a lessee for life, or donee in tail, rendering rent, shall have a *warrantia chartæ*; for by the statute *de bigamis ch. ult.* the reversion and rent contain warranty. F. N. B. 134. G.

So, *warrantia chartæ* lies *quia timet*, before action sued, as well as after. Ibid. K. 135. L. Hob. 21.

So, it lies before action sued, though the plaintiff may be impleaded in an action in which voucher lies; and if he is afterwards impleaded in such action, he must vouch, or have a *scire facias* upon the judgment in *warrantia chartæ*. F. N. B. 134. K. 135. A. Bo. R. Act. 240. R. Mo. 859.

So, it lies *pendente placito* in an action in which voucher lies, and if the plaintiff recovers his warranty, and afterwards loses his land, he shall have an *habere facias ad valentiam* without a *scire facias*. F. N. B. 135. D.

So, if the vouchee does not appear upon the *sequat. sub suo periculo*. Co. Lit. 102. a.

So, if a man is impleaded in assise, writ of entry in the nature of an assise, &c. where voucher does not lie, and loses his land, he may afterwards have *warrantia chartæ*. F. N. B. 134.

But if he loses his land in an action in which he may vouch, and [\*]he does not vouch, he cannot afterwards have a *warrantia chartæ*. F. N. B. 134. I.

*A fortiori* if he vouches and has judgment to recover in value. Co. Lit. 102. a.

So, he shall not have a *warrantia chartæ*, if there be no warranty in the conveyance by which the land passed, or in the release or confirmation of it. Hob. 21. Vide supra.

So, no one shall have a *warrantia chartæ* if he is impleaded, when he is only pernor of the profits, and not terretenant. F. N. B. 135. C.

If he is in of another estate by which the warranty is determined. Ibid. G.

## (3 N 2.) Process.

The process in *warrantia Chartæ* is summons, attachment, and distress infinite.

And if *nihil* is returned, a *capias* lies, as in covenant.

[\*565]

(3 N 3.) Count.

The count in *warrantia chartæ* must shew the specialty of the warranty and lien. Hob. 21.

And therefore, if it is upon a warranty in a fine, it must shew the fine, and to whose use it was, and the default in the defendant to warrant. Hob. 20.

So, the count and writ must shew the special case for warranty. R. Mo. 860.

*Warrantia chartæ* lies in whatever county the plaintiff pleases, if no place is mentioned where the deed was dated; if it is mentioned, it must be in that county; and in warranty by reason of homage auncestrel, where the land lies. F. N. B. 134. F.

But, if it shews a joint warranty by A. and his son, it may charge the son as heir to A. Mo. 20.

So, the count concludes *ad damnum* of the plaintiff. Hob. 23.

Though the writ be *quia timet*, in which case he shall not recover damages. Ibid.

(3 N 4.) Plea.

The defendant may plead that the plaintiff is not yet impleaded, on which the plaintiff shall have his judgment immediately; for it admits his lien to warranty. Hob. 23. F. N. B. 134. K.

So, the defendant may plead that the plaintiff was not tenant of the land the day of the writ purchased, for *warrantia chartæ* lies only by the tenant of the land. Hob. 22. Mo. 860.

But tenant by admittance is sufficient; for the vouchee may have a *warrantia chartæ* to deraign the warranty paramount. Hob. 22.

So, he may plead the general bar *non dedit* or *non concessit*, &c.; for if nothing passed by the deed, the warranty does not bind. Hob. 22. Mo. 860.

[\*](3 N 5.) Judgment.

All the lands which the defendant had at the time of the writ shall be bound by the judgment, though aliened afterwards. F. N. B. 134. I.

If there is judgment for the plaintiff, and he is afterwards impleaded for rent, he may have a *scire facias* upon the judgment. Mo. 860.

But though the plaintiff has judgment in a *warrantia chartæ*, whereby the land which the defendant had at the time of the writ purchased, is bound; yet, if the plaintiff is afterwards impleaded for the land warranted, and loses it, if he does not vouch the warrantor, he shall not have the benefit of his judgment in *warrantia chartæ*. F. N. B. 134. K.

So, if he is impleaded in assise, or *scire facias*, &c. in which he cannot vouch, he ought to give notice to him who made the warranty, and inquire what defence he shall make, otherwise he shall have no advantage of his recovery in *warrantia chartæ*. Q. F. N. B. 135. a.

(3 O) PROCEEDING IN WAST.

(3 O 1.) Process.

The original in wast is a summons, which was given by the st. W. 2. 14. instead of a prohibition at common law. 2 Inst. 389.

And if it be against a tenant in dower, or guardian, it does not recite the statute. F. N. B. 55. C. Lut. 1548.

But a writ against tenant for life or years recites the statute. Ibid.

So, if it is against tenant by the curtesy. F. N. B. 56. C.

If the statute is recited, it is sufficient, though it is not exactly recited. Lut. 1548. Vide Action upon Statute (I).

Though the conclusion of the writ is larger, or less than the recital; as, if [*terris*] is omitted in the recital, and at the conclusion the wast is alleged in *terris*. Lut. 1548. F. N. B. 56. I.

Or, if the statute is recited in *terris, domibus, boscis, et gardinis*, and wast is alleged in *terris* only, or a house only, &c. Lut. 1548.

At the return of the summons, the defendant may cast an *essoign*.

After return of the summons, or if an *essoign* is cast, at the day to which it was adjourned, by the st. W. 2. 14. the plaintiff shall have an attachment. Clift. 825.

If an *essoign* was not cast upon the summons, it may be at the return of the attachment.

By the st. W. 2. 14. if the defendant does not appear upon the attachment, a *distringas* goes. Clift. 828.

If the defendant does not appear upon the *distringas* by the st. W. 2. 14. *mandetur vicecom. quod in propria persona assumpt. secum duodecim, &c. accedat. ad locum vastat. & inquiret de vasto, & post inquisitionem retorn. procedat ad judicium secundum quod continet., in stat. de Gloc. 5.*

The judgment shall be *quod recuperet locum per vis. jur.* R. Ow. 12. Pop. 24. Co. Ent. 696. b.

Though all the processes are returned *nihil*, so that it may be that the defendant was never summoned, nor any writ served, yet if [\*]he does not appear upon the *distringas*, an inquiry of the waste shall be awarded. 2 Inst. 389.

If default be by tenant by the curtesy, or in dower, as well as for life or years. Win. Ent. 1046. (or 1160. edit. 1680.)

And there shall be an inquiry of the damages, as well as of the wast. R. Cro. El. 18. R. Hutt. 44.

But if the defendant appears upon the *distringas* and pleads, though he afterwards makes default, there shall be no inquiry of wast; for this case is not within the purview of the statute. 2 Inst. 390.

So, if there be judgment by confession, *nil dicit* or *non sum informatus*, there shall be inquiry of damages only; for the wast is confessed. R. Cro. El. 18. Hut. 44.

And if he releases his damages, the plaintiff shall have judgment immediately for the place wasted. Hut. 44.

And the sheriff need not go to the place wasted in person. R. Poph. 24.

Yet judgment may be entered *per visum juratorum*. Ow. 12. Poph. 25.

And if the inquiry is by more jurors than twelve, it will be good. R. Cro. Car. 414.

And they may find entire damages for all the wast assigned. R. Cro. Car. 414.

A writ for wast in *dote* must be against the wife. Reg. 72. a.

And it shall not be said wast by exile, except where the villeins of a manor are expelled from the manor. Ibid. F. N. B. 55. C.

So, a writ by him in remainder executed by the statute of uses must be special. R. Dal. 5.

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(3 O 2.) Count.—Must shew the plaintiff's title.

By whom wast shall be brought, vide Wast, (C 2, 3.)

In wast the plaintiff must shew how he is entitled to the inheritance. 2 Rol. 832. l. 40. Hob. 84. Vide ante, (C. 34.)

And therefore, if he counts upon a lease by himself, he must shew his seisin in fee, and demise to the defendant. Yel. 140.

If upon a lease by his ancestor, he must shew seisin, a demise to the defendant, and descent to the plaintiff. Co. Ent. 708. b.

If the plaintiff claims by fine, he must plead the fine, and the uses of it. Co. Ent. 700, 701. Clift. 819.

If by common recovery, he must shew the recovery and uses. Win. Ent. 1025. (or 1139. edit. 1620.) Lut. 1541. Clift. 814.

If by grant of the reversion, he must shew how he claims *ex assignatione*. 2 Rol. 831. l. 40. 2 Sand. 230. 234. Co. Ent. 608. Win. Ent. 1050, 1051. (or 1164.) Lut. 1543.

If the plaintiffs sue as parceners or joint tenants, the declaration shall shew that they are so. Win. Ent. 1049. (or 1163.)

If the plaintiff sues as rector, &c. *in jure ecclesiæ*, he must shew that he is so. Win. Ent. 1047. (or 1161.)

If husband and wife in right of the wife sue, they must allege the reversion in both. R. Hob. 1.

[\*]But if he concludes *ad exheredatione*., it supplies the omission of what estate he was seised after a verdict. Per two J. Cro. El. 57.

So, if he counts of a feoffment to A. to the use, &c. it is sufficient without saying that it was to A. and his heirs. R. Hob. 84.

If the plaintiff shews the special matter it is sufficient, though he does not name himself assignee. R. 2 Rol. 831. l. 50.

So, if the writ is general, *cujus hæres* the plaintiff is, though he has a special inheritance. R. 1 Leo. 48.

So, if the plaintiff shews a fine to the use of B. for life, and afterwards to A. and the heirs of his body, and afterwards to the plaintiff in fee, and that A. died, *per quod* B. was seised for life, remainder to the plaintiff, and that B. committed wast to his disherison, this supplies the omission that A. died without issue. R. Cro. Car. 401.

If the plaintiff has the reversion, he shall say that the defendant holds of him. 2 Rol. 830. l. 36.

Otherwise, if wast is brought by him in remainder. Ibid. l. 38. 40. Dal. 5.

Or, by the lord who has by escheat, for there is no tenure of him. Hut. 110.

(3 O 3.) How the wast shall be charged; in the *tenet* or the *tenuit*.

Against whom wast shall be brought, vide Wast, (C 4, 5.)

The plaintiff must always charge the defendant in the *tenet* or in the *tenuit*; for there is no other form. R. Cro. El. 356.

And must charge him as assignee, executor, &c. Co. Ent. 693. 695.

And must charge him by virtue of the lease by which he is possessed; as, if he be in, in his *remitter*, he must charge him as tenant by his ancient lease. 2 Rol. 831. l. 7.



If the defendant is in by devise, he must charge him as tenant *ex legatione*. Ibid. l. 21. R. Hut. 110. Co. Ent. 700.

If the defendant claims by a remainder for life or for years, which is now in possession, he may be charged upon a demise to him. 2 Rol. 831. l. 25.

But, if the defendant is in by the statute of uses, it is sufficient to charge him generally, without saying of whose demise. R. 2 Leo. 222.

Wast by an infant against his guardian shall be always in the *tenet*. 2 Rol. 829. l. 51.

So, against tenant for life it shall be in the *tenet*, for there is no other form. 2 Rol. 830. l. 3.

Though after the wast he granted over his estate. 2 Rol. 829. l. 45.

Or, the lessor had entered for forfeiture or condition broken.

So, if a woman tenant for life commits wast, and assigns her estate, and takes husband, it shall be against them that *tenent*. 2 Rol. 829. l. 53.

[\*] But wast by an heir after full age against his guardian, shall be in the *tenuit*. 2 Rol. 830. l. 18. 20. Co. Lit. 54. a.

So, against a tenant for another's life after the death of *cestuique vie*. 2 Rol. 830. l. 15.

Or, against tenant for years after the term expired. 2 Rol. 830. l. 10.

Or, after forfeiture. Ibid. l. 16.

So, if a woman commits wast, and then *cestuique vie* dies, or the term expires, and she takes husband, the declaration shall be *quod tenuerunt*. Ibid. l. 25.

Or, that the wife, *sum sola*, *tenuit*. Ibid. l. 30.

The declaration shall suppose that the defendant *tenet ad terminum annorum*, though he holds only for one year, or half a year. Co. Lit. 54. b.

If the lease is to two, and the writ supposes *quod tenet* or *tenuerunt*, which imports a joint estate, it is good; though one of the defendants has it by assignment from the lessee. R. 1 Leo. 48.

If he declares upon several demises, it will be good. R. Ow. 11. Poph. 25.

### (3 O 4.) Conformable to the writ.

The declaration must assign the wast conformable to the writ; for if the writ is for wast in land, and it is assigned in cutting wood, it is bad. Mo. 73. Vide ante, (C 13.)

If it is for three vills, and the declaration is for wast in one or in another vill. R. Mo. 862.

### (3 O 5.) Particularising the quantity and quality, &c.

So, it must particularise the quality or quantity of the wast; as, if it is in cutting trees, he must shew the number of the trees. 2 Rol. 832. l. 50.

If wast consists in quantity, it must say so many *carectat*. Ibid. l. 52.

If wast is assigned in *domibus*, it must shew the particular defects.

If it is assigned in land, it must say in what parish it lies. R. 3 Leo. 9.

If the demise is of a moiety of a manor and other lands, and the wast assigned in wood, parcel of the premises, it is bad; for it cannot be parcel of the manor, and also of the other lands. Ibid.

So, it is sufficient to assign wast directly, without shewing the particular manner in which it was committed; as, if the wast is by a stranger, it is sufficient to say that the defendant committed wast in cutting, &c. without saying in *permittendo* the stranger. 2 Rol. 833. l. 7.

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If it is in germins, it is sufficient to say that he destroyed the germins generally, without saying that he suffered the hedges of the wood to be neglected, whereby cattle entered and eat the germins. Ibid. l. 5.

[\*](3 O 6.) Must be *ad exhæreditationem querentis*.

So, the declaration must be *ad exhæreditationem* of the plaintiff.

If the plaintiff is seised in right of his wife, it shall be *ad exhæreditationem* of the wife. 2 Rol. 832. l. 15. 20.

If wast be by an abbot, prior of an hospital, &c. it shall be *ad exhæreditationem domus, hospital., abbat., or ecclesiæ*. Ibid. l. 30.

So, if there are several plaintiffs in wast, there may be summons and severance ; for it is real action, and is *ad exhæreditationem*. 2 Inst. 307.

(3 O 7.) Pleas.—No wast committed.

To an action for wast the general issue is no wast done. 2 Sand. 238. Co. Ent. 700. 708.

And this admits nothing, but puts the whole declaration in issue. R. Lut. 1547.

And it may be pleaded in all cases where there is no wast ; as, if destruction happens by tempest, lightning, enemies, &c.

But it is no plea where the defendant has matter of justification or excuse.

So, if there is a lease to A. for two years, and afterwards a lease to B. for ten years, in wast against B. for wast during the two years, he cannot plead no wast done. R. 3 Leo. 203.

So, he may plead as to part of the wasts assigned, no wast done. Co. Ent. 702, 3.

If several wasts are assigned, and the defendant is not guilty of part of any, he may plead no wast done to all together, and need not say to every part severally no wast. Lut. 1550. Win. Ent. 1168.

(3 O 8.) Release.

So, the defendant may plead in bar a release from the plaintiff, or one of the plaintiffs. 9 H. 5. 15. Vide post, (3 O 16.)

(3 O 9.) Accord.

To wast in the *tenuit*, accord with satisfaction. R. Cro. El. 357. Co. Ent. 707. b. Vide Accord, (A 1.)

(3 O 10.) Pleas in abatement.

So, the defendant may plead in abatement to the plaintiff's title : as, if he entitles himself to the reversion in fee by descent, the defendant may plead a devise to the plaintiff in tail. Lut. 1557.

And need not traverse the descent : but if he does, it will be good upon a general, though not upon a special demurrer. R. Lut. 1558.

So, the defendant may plead that the plaintiff has nothing in reversion. Yel. 141.

But he ought to shew how the reversion is divested, for nothing in reversion generally will be bad. Co. Lit. 356. a.

[\*]Except where wast is brought by a grantee of the reversion. Ibid.

So, if the plaintiff's title fails *pendente lite*, the defendant may plead it after the last continuance.

As, if his reversion fails. Yel. 141.

If he becomes tenant in tail after possibility. 1 Rol. 106.

**(3 O 11.) In justification.—For repairs.**

So, the defendant may plead in justification, that he took for repairs. Co. Ent. 703. a. Win. Ent. 1029. (or 1142. edit. 1680.) Vide Wast, (E 1, &c.)

That he pulled down, to rebuild and repair the house, fences, &c. Win. Ent. 1029. 1067. (or 1142. 1182.)

That he took for repair of the fences and other necessary uses. Ibid. 1029. (or 1142.)

But it is not sufficient to say, that he took for repairs, if he does not add that he used or keeps for repairs. R. 3 Lev. 323.

**(3 O 12.) For boots.**

So, he may plead that he took for other necessary boots: as, for fuel. Co. Ent. 703. a. Win. Ent. 1032. or 1144. Vide Wast, (E 1, &c.)

Or, for necessary wainboot, cartboot, or plowboot. Win. Ent. 1030. 1055. (or 1144. 1169.)

Or, for gates, stiles, &c. Ibid. 1031. (or 1145.)

Or, for making utensils of husbandry. Ibid. 1055. (or 1169.)

Or, for hedgeboot. Co. Ent. 703. a.

But these justifications must be pleaded; they cannot be given in evidence under the general issue. Reg. Plac. 272.

**(3 O 13.) *Aridæ mortuæ.***

So, he may plead that they were *aridæ mortuæ, nec fructum nec folia portant*.

But it is not sufficient to say *quæ fuerunt aridæ, cava, in columnis putridæ, Anglice pollards non habent sufficiens maheremium pro aliquibus edificiis*. R. Mo. 101.

**(3 O 14.) Lease without impeachment, &c.**

So, he may plead that the lease was without impeachment of wast. R. 2 Rol. 835. l. 10. 15. Co. Ent. 694. b. Vide Wast, (E 3.)

That the plaintiff's ancestor made a bargain and sale of the trees to him. Win. Ent. 1043. (or 1157: edit. 1680.)

That the lessor covenanted that the lessee might cut down trees. Hard. 113. 1 Leo. 117.

But it is no bar, that the lessor covenanted to repair, and that he did it for him. R. Mo. 23.

**[\*](3 O 15.) In-excuse—*Reparavit*.**

So, the defendant may plead in excuse *quod reparavit* before the action brought; for the jury must view the place wasted. 5 Co. 119. b. 2 Inst. 307.

*Quod re-ædificavit*, and since kept in repair. 2 Leo. 189.

But *reparavit pendente lite* is no plea. 2 Inst. 307.

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(3 O 16.) A release.

So, the defendant may plead a release from the plaintiff.

And if the wast is by two plaintiffs in the *tenuit*, a release by one is a bar to both. 2 Inst. 307.

But where wast is in the *tenet*, a release by one plaintiff bars himself only. Ibid. Vide ante, (3 O 8.)

(3 O 17.) *Repari non potuit.*

So, the defendant may plead that it was so ruinous at the commencement of his lease *quod reparari non potuit*. Mo. 54. Win. Ent. 1045. (or 1159. edit. 1680.) Vide Wast, (E 4.)

(3 O 18.) No demise.

So, the defendant may plead, no demise made to him.

Or, no demise as to part. Co. Ent. 697. b.

Or, that wood was accepted by the demise. Win. Ent. 1062. (or 1176. )

Or, *nihil habet ex assignatione de. B.* Ibid.

So, that, after the demise, the defendant assigned, before which assignment no wast was done. Co. Ent. 697. b.

**Replication.**

To assignment before wast done, the plaintiff may reply, that the assignment was by fraud, and he afterwards took the profits. Ibid. 698. a.

And if the defendant rejoins, he must traverse the pertainancy of the profits, not the fraud. R. 5 Co. 77. b.

(3 O 19.) A mesne remainder-man alive.

So, the defendant may plead, a mesne remainder-man still alive. Win. Ent. 1019. (or 1132. edit. 1680.)

(3 O 20.) *Venire facias.*

After issues joined upon several pleas, if the *venire facias* recites the issues and commands *quod venire fac. duodecim, &c. ad inquirendum si* defendant *fecit vastum*, as the plaintiff alleges, it is sufficient; for this implies *quod inquire.* of the several issues. R. Cro. Car. 381.

[\*](3 O 21.) View in wast.

In wast, if issue is joined, the jury ought to have a view of the place wasted, otherwise the trial shall be staid. Lut. 1558. 2 Sand. 254.

And therefore, if wast is assigned in several places, the jury may find no wast done in a place of which they had no view. Per Dy. 1 Leo. 267.

And they ought to have a view though the issue is upon a collateral point, and the wast is confessed. Per two J. Glanv. Cont. Noy, 5.

The *venire facias* shall be, that the jury shall have a view. Win. Ent. 1039. (or 1153. edit. 1680.)

And six jurors at least must have the view. 2 Sand. 254.

And, if it is not returned, the court may examine whether the jurors have viewed or not. Ibid.

So, if it is returned, the court may examine; for the return does not conclude the parties. 2 Sand. 255.

But, if the wast is assigned in a wood *sparsim*, it is sufficient, if the jury view the wood, though they do not enter into it. R. 1 Leo. 267.

So, if it be in several rooms of a house, it is sufficient, if they have a general view of the house. Ibid.

So, it is not necessary, that the officer return, upon the *distringas juratorum*, that the jury have viewed. R. 2 Sand. 254.

Or, that he be present at the view. 2 Sand. 255.

### (3 O 22.) Judgment in waste.

What shall be recovered, vide Wast.

If there be judgment for want of an appearance upon the *distringas* by the st. W. 2. 14. the sheriff taking twelve, &c. shall go to the place wasted, and take an inquisition of the damage, and upon the return thereof there shall be judgment. R. Ow. 12. Vide ante, (3 O 1.)

If the defendant suffers judgment by confession, *nil dicit*, or *non sum informatus*, there shall be inquiry of the damages only. Vide ante, (3 O 1.)

If the judgment is against the defendant in the *tenet*, it shall be *pro loco vastato*, and for damages.

If the judgment is against the defendant in the *tenuit*, it shall be for damages only.

If the verdict is for the defendant, the judgment shall be *quod querens nil capiat*, &c. and the defendant *eat sine die*. 2 Sand. 247.

And if the defendant will not pray judgment, to avoid a writ of error, it may be entered, upon the prayer of the plaintiff, against himself. R. 2 Sand. 253.

In an action of wast on the statute of Gloucester against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the court will give the defendant leave to enter up judgment for himself. 2 Bos. & Pull. 36.

## [\*]PLEDGE.

Vide CHANCERY, (4 A 1, &c.)—MORTGAGE.

## PLEDGES.

Vide BAIL, (C.)—PLEADER, (C 16.—3 K 5.)

## PLENARTY.

Vide ABATEMENT, (H 26.)—ESGLISE, (M.)—PLEADER, (3 I—8.)—QUARE IMPEDIT.

## PLENE ADMINISTRAVIT.

Vide PLEADER, (2 D 9.)

## PLURALITY.

Vide ESGLISE, (N 5, &c.)











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